162 U.S. 592

162-592

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 710.

CHARLEY SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED AUGUST 22, 1895.

(16000.)

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1 *"Minutes circuit court, Bolivar County, Miss., Thursday, November term, November 29th, 1894."*

Be it remembered that a regular term of the circuit court of Bolivar County, State of Mississippi, for the transaction of criminal business, was begun and held in and for said county, at the court-house thereof in the town of Rosedale, on the 5th Thursday, being the 29th day of November, A. D. 1894, at the time and place, and in the manner prescribed and fixed by law, for the holding of said court.

Present: R. W. Williamson, judge.
" Walton Shields, district attorney.
" George P. Melchior, sheriff.
" J. E. Ousley, clerk.

The court having been regularly opened by proclamation of sheriff for transaction of criminal business, proceeded to convene same. U. P. Norvell, R. M. Sledge, C. G. Gowan, Eugene Warren, W. H. Fitzgerald, R. J. Crowder, Thomas McEvans, A. M. Wooten, J. W. Stephens, P. J. King, G. G. Jones, J. F. Joyce.

The sheriff returned into open court this day the above-named persons regularly drawn, etc., to serve as petit jurors for the second week of the November term, 1894; the above-named were those drawn by the sheriff and clerks of circuit court and chancery court, who were drawn for the second week, who answered to their names. Whereupon the sheriff returned the following talesmen to complete jury No. 2.

Be it remembered that heretofore, to wit, at the May term, 1894,
2 among the proceedings had in words and figures, as follows, to wit:

Be it remembered that a regular term of the circuit court of Bolivar County, Mississippi, for the transaction of civil business, was begun and held in and for said county, at the court-house thereof in the town of Rosedale, on the first Monday of May, A. D. 1894, same being the 7th day of May, at the time and place and in the manner prescribed and fixed by law for the holding of said court, when there was present and presiding, Hon. R. W. Williamson, judge; Walton Shields, district attorney; George P. Melchior, sheriff; J. E. Ousley, clerk.

The court, having been regularly opened by proclamation of the sheriff, proceeded to business.

The board of supervisors in and for said county and the fourth district having furnished a list of persons to serve as jurors, in accordance with law, and the same having been certified to the clerk of this court by the clerk of the chancery court and filed as the law directs, and from said list the names of (50) fifty persons were drawn, in accordance with section 2367 of the code of 1892, and summoned by the sheriff to serve as jurors for the first week of the present term, to wit:

In circuit court, Bolivar County, May term, 1894.

List of names drawn by circuit clerk, sheriff, and chancery clerk, by direction of the honorable R. W. Williamson, presiding judge of the fourth judicial district of the State of Mississippi, for the May term of our said circuit court of Bolivar County, beginning on the first
3 Monday of May, A. D. 1894, for the week of said term beginning the 7th day of May, A. D. 1894.

List of jurors.

George R. Newsom	3	W. J. Terrell	3
Scott Miller	1	J. W. Little	1
J. W. Gill	2	Jett Dent	3
Charles Scott, jr.	3	M. Bender	2
G. W. Ousler	4	J. J. Claxton	2
J. D. Chrisman	3	C. P. Gibson	3
E. W. Phillips	4	E. A. White	4
A. F. Goza	3	S. W. Roark	3
Will Hunter	2	W. H. Cheek	1
S. J. Simpson	1	J. L. Dunn	1
C. C. Farrar	3	W. A. Martin	3
L. T. Wade	4	Claude Seals	1
J. S. Gant	3	A. P. Wright	2
C. G. Gowan	2	F. M. Scott	3
R. H. Purnell	3	G. Y. Lancaster	5
J. B. Park	1	D. H. Fitzhugh	1
J. C. Lauderdale	2	G. W. Paison, jr.	5
Percy Sanders	3	C. L. Wilkerson	5
R. P. Curry	3	M. V. Smith	5
E. H. Wray, sr.	5	R. H. Gatewood	4
E. A. Stang	5	J. T. Nelson	3
W. E. Ringo	5	W. R. Wilbourn	1
M. L. Walt	5	E. J. Coleman	5
John Williams	2	James Bradshaw	2
F. P. Givens	5	W. A. Dockery	3

4 THE STATE OF MISSISSIPPI,
County of Bolivar:

We, J. E. Ousley, clerk of the circuit court of Bolivar County; George P. Melchior, sheriff of Bolivar County; T. P. McGuire, chancery clerk of Bolivar County, do hereby certify that by direction of the Honorable R. W. Williamson, presiding judge of the fourth judicial district, we, on the 23rd day of April, A. D. 1894, being the day set by law, in the circuit clerk's office of said county, drew from the box known and kept as "jury box" the names above written to serve as jurors at the next term of our circuit court, to be holden at Rosedale, in said county, beginning on the first Monday of May, A. D. 1894, and that said list of jurors were drawn for the week beginning on Monday, the 7th day of May, A. D. 1894.

Given under our hands this the 23rd day of April, A. D. 1894.

J. E. OUSLEY, *Circuit Clerk.*
GEO. P. MELCHIOR, *Sheriff.*
T. R. MCGUIRE, *Chancery Clerk.*

Of the list of names so drawn the judge in open court drew from the list so drawn and summoned to appear for the first week the following-named persons to serve as grand jurors for the present term of the court, to wit: Charlie Scott, jr., F. M. Scott, E. W. Phillipps, E. H. Wray,

Claude Seals, John Williams, M. V. Smith, G. W. Ousler, D. H. Fitzhugh, R. P. Curry, E. A. Stacey, C. C. Farrar, J. D. Chrisman, S. J. Simpson, A. P. Wright, M. S. Walt.

Of the number so selected, drawn, summoned, and appearing and answering in person the following, for good and sufficient reasons
5 presented to the court, were by the court excused, to wit: E. J. Coleman, Jett Dent, S. W. Roark, W. A. Dockery, Will Hunter, M. Bender, Aaron Goza, L. T. Wade, J. C. Lauderdale, J. W. Gill, Percy Sanders, and R. H. Guttewood.

And of the number so drawn and appearing, the following persons were examined under oath touching their qualifications as grand jurors, and found qualified, were empannelled to serve as grand jurors for the present term of the court, being (16) in number, as follows, to wit: Charles Scott, jr., F. M. Scott, E. W. Phillipps, E. H. Wray, Claud Seals, John Williams, M. V. Smith, D. H. Fitzhugh, R. P. Curry, E. A. Stacey, C. C. Farrar, J. D. Chrisman, S. J. Simpson, A. P. Wright, G. W. Ousler, M. S. Walt.

Of the number so selected, drawn, summoned, empannelled, the court appointed F. M. Scott to serve as foreman of the grand jury, who in the presence of the grand jurors, who took the same oath their foreman had taken before them, who after receiving the charge of the court retired to consider the same in charge of their sworn bailiff, L. T. James, who took the oath required by law, retired to consider of presentments and indictments.

Among other proceedings had at the May term, 1894, the following indictment in words and figures as follows, to wit:

THE STATE OF MISSISSIPPI,
Bolivar County:

In the circuit court in and for said county, at the May term thereof, in the year of our Lord 1894, the grand jurors of the State of Mis-
6 sissippi, taken from the body of the good and lawful men of the county aforesaid, duly elected, summoned, impannelled, sworn, and charged at the term aforesaid, of the court aforesaid, to inquire in and for the body of Bolivar County aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present that one Charley Smith, late of the county aforesaid, on the 14th day of May, A. D. 1894, with force and arms in the county aforesaid and within the jurisdiction of the court, one Wiley Nesby, a human being, did then and there wilfully, feloniously, and of his malice aforethought, kill and murder, contrary to the statute in such made and provided, and against the peace and dignity of the State of Mississippi.

WALTON SHIELDS,
District Attorney.

(Endorsed:) No. 2810. The State of Mississippi, Bolivar County, circuit court, May term, 1894. The State vs. Charley Smith. Murder. Indictment; no prosecutor. Witnesses: Charlie Jones, G. B. Jones, Will Tutron, Grant Porter, Brantley Jones, Sam Swann, Rafe Jones, Johnson McCrawley, John McGirth, Adam Coleman, Richard Murrell, and

Wash Lott. A true bill. F. M. Scott, foreman of the grand jury. Filed this 15th day of May, 1894. J. E. Ousley, clerk. John L. Gill, D. C.

7 Whereupon before arraignment the defendant moves the court to quash indictment in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLES SMITH.

Now comes the defendant in this cause and moves the court that the indictment herein filed against him be quashed—

1st. Because the grand jury which was empannelled, sworn, and charged on the first day of the May term of the circuit court, 1894, and which said jury presented the said indictment herein aforesaid, was not elected by the board of supervisors of said county of Bolivar, State of Mississippi, at the February session thereof, 1894, according to law, in this, that at which said session thereof said board of supervisors selected a list of names of persons to serve as jurors, to serve at the regular terms of the circuit court of said county for the year 1894, which order of said board of supervisors, as appears of the record of that said proceeding at that said session, fails to show that the said list of names of said persons as was selected by said board of supervisors at said meeting for said purpose were selected from the registration roll of said county of Bolivar, State aforesaid, or that the said list of persons, so drawn, were the names of persons citizens of said State and county, or that the said drawn jurors were drawn or selected by the said board of supervisors according to law, or that the said list of names of persons so selected as aforesaid for the purposes aforesaid were qualified voters of said county at the time
8 of said selection, or that the said board of supervisors of said county used the registration roll of said county as their guide in making said list of names of persons to serves as jurors for the purposes and times aforesaid. The record of said proceedings of said board of supervisors defendant is advised appears in minute book E, page 633, duly authenticated and now on file in the chancery clerk's office of said county.

Second. The said board of supervisors selected the said list of names of persons to serve as jurors of said county for the times of circuit court of said county, partial to other qualifications possessed by said persons, to wit, "Good intelligence, sound judgment, and fair character," which qualifications are not enumerated in the specific qualifications enumerated in the constitution of the State of Mississippi, as required of jurors, grand and petit, in State courts and the said grand jury which indicted the defendant herein were selected from the said list of jurors, and was not an impartial jury, as guaranteed by the constitution of State aforesaid and of the United States, of which defendant is a citizen of color, black; and it is further charged that because of the prejudice against him and his race on account of their color the grand jury aforesaid was purposely selected of the white race, to the exclusion of the colored persons of the county competent for jury service, by the officers charged thereof with under the State law, on account of their color, for the purpose of procuring this indictment against defendant, in violation of his constitutional right to be tried for his life upon the charge of murder herein in the circuit of Bolivar County, State aforesaid.

3rd *third*. Further, and ask subpœnas for said officers to prove
9 the same. The certificate of the circuit clerk, the sheriff, and chancery clerk of said Bolivar County, which is attached to the list of persons drawn by the circuit clerk of said county, in the presence of said chancery clerk and sheriff of said county, said persons so drawn being selected to serve for the May term of said circuit court, 1894, and now recorded on the minutes of the circuit court of Bolivar County, Mississippi, for the first day of said term of court, which said certificate is erroneous and void as to the authenticity of the said drawing of said jurors by said officers aforementioned—circuit clerk, chancery clerk, and sheriff of said county—in this, that the said certificate does not show upon its face the statutory allegation whether the envelopes containing the names appears to have been opened or disfigured, the lack of which authenticative certificate vitiates the legality of said jury list; and the grand jury aforesaid; drawn from said list, on the first day of the present term and presented the indictment aforesaid against defendant, was not a duly elected and legally empannelled grand jury as contemplated in the guarantee of the constitution of the State of Mississippi and the Constitution of the United States.

CHARLES SMITH.

"Sworn to and subscribed to before me, the undersigned circuit clerk of Bolivar County, Miss., this the 17th day of May, 1894, as to the best of his knowledge and belief.

CHARLES SMITH."
J. E. OUSLEY, *Cl'k.*

(Endorsed:) Motion to quash indictment. State vs. Charley Smith. 2810. Filed May 17th, 1894. J. E. Ousley, cl'k. John L. Gill, D. C.

10 Whereupon, to wit, May 17th, 1894, the defendant, Charlie Smith, was duly arraigned, as appears on the minutes, Book "J," page 418, in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This day came the district attorney, who prosecutes for and on behalf of the State, and the defendant in his own proper person and by counsel, and the defendant, Charley Smith, being solemnly arraigned upon the indictment, enters a plea of not guilty. The defendant demanded a special venire. Whereupon a special venire of fifty names was drawn from the jury box, in open court, and a venire facias issued, returnable on Monday, May 21st, 1894, at 9 o'clock a. m., thus done in open court, and in the presence of the defendant.

Whereupon the defendant made a motion to quash the indictment, as appears on the minutes, Book "J," page 422, May 18th, 1894, in words and figures, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on to be heard, the district attorney appearing on behalf of the State and the defendant in his own proper person and by

attorney, defendant informed the court before arraignment and plea entered that he was preparing a motion to submit to the court that the indictment be quashed. Whereupon the court informed defendant and his attorney that the motion will be considered as if made and
11 passed upon on call of motion docket regularly, and be disposed of as if heard then before arraignment, after which defendant being arraigned plead not guilty, requested a special venire of 50 persons, which was ordered by the court and same regularly drawn, entered to-day by permission of the court as of yesterday's proceedings.

Afterwards, to wit, May 21st, 1894, the following on Minute Book I, page 431, in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This day came the district attorney, who prosecutes for and on behalf of the State, and the defendant, Charly Smith, in his own proper person and by counsel, and thereupon came on to be heard the motion of the defendant to quash the indictment, as made before plea entered herein, and the court having heard the said motion and argument of counsel, and being sufficiently advised in the premises, doth order that the same be and is hereby overruled.

Afterwards, to wit, May 21st, 1894, the following order was made, Minute Book "I," page 431:

STATE
vs. } 2810. Murder. Continued on application of State.
CHARLEY SMITH.

Afterwards, to wit, May 22nd, 1894, among the proceedings had is the following special bill of exceptions, which is in words and figures, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Be it remembered that on the 21st day of May, 1894, this cause came on to be heard on motion to quash the indictment herein as filed
12 in the case, as before plea entered, and the court then and there, being sufficiently advised thereupon, ordered that the said motion be, and the same was, overruled, and the defendant then and there excepted to the said ruling of the court, and tenders this his special bill of exceptions herein to said ruling.

Signed May 22nd, 1894.

R. W. WILLIAMSON,
Judge District Circuit Court for the Fourth Judicial District of Mississippi.

(Endorsed:) 2810. State vs. Charley Smith. Murder. Special bill of exceptions. Filed May 22nd, 1894. J. E. Ousley, Clk. John L. Gill, D. C.

STATE OF MISSISSIPPI,
Bolivar County:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Be it remembered that on the 29th day of November, A. D. 1894, in the circuit court of Balivar County, State of Mississippi, at a regular term thereof, the above-styled case was called, and during the said term of the said circuit court the following proceedings were had in said case, to which exceptions were then and there taken by the defendant. On the first day of the criminal term of the said term of the said court, to wit, Nov. 29th, 1894, defendant made in writing the following application for the removal of his cause and trial of said indictment, upon which he was then charged and called for trial, to the United States circuit court for the western division of the southern district of the State of Mississippi, as follows, to wit:

13

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

THE STATE OF MISSISSIPPI,
Bolivar County:

To the honorable circuit court of said county, November term, 1894, Hon. R. W. Williamson sole presiding therein as judge of the fourth judicial district of the State of Mississippi:

This petition respectfully shows that Charley Smith, a citizen
14 of the United States, is in custody of the sheriff of Bolivar County, Mississippi, by virtue of an indictment presented by what purports to have been a regular grand jury for the May term of said circuit court, 1894, upon a charge of murder. Relator states that he is a citizen of the State of Mississippi, and that under the constitution of said State, section 14 thereof, he is guaranteed that for such an offense he shall first be presented and tried by an impartial jury. Further, that he shall not be deprived of his liberty or of his life in the State aforesaid except by due process of law, and that said State constitution, as shown and prescribed in section 264 thereof, which qualifications shall be required of jurors, grand and petit, in the said State; and that the statute of 1892 of said State, styled the Annotated Code of Mississippi, adopted by the State legislature on day of April, 1892, prescribes new and separate requirements for jurors, different, separate, and distinct from those requirements fixed by the constitution of said State, to wit: The constitution of said State prescribes, sec. 264, that all qualified electors able to read and write shall be competent to serve as jurors in the courts of the State. The statute of said State, viz, the Annotated Code of 1892, section thereof, provides that the board of supervisors of said county shall use as a guide (in selecting names of persons to serve as jurors for the two terms of the circuit court next, respectfully, to be holden after the then list being prepared by them, the said board of supervisors) the registra-

tion roll of legal voters of the county, and that they shall select of jurors to serve as aforesaid persons of "good intelligence, fair character, and sound judgment;" and such of said statute is in conflict with the constitution of said State.

15 Further, the record of the board of supervisors of said county show' that the list of jurors aver'ing to have been drawn by them for the term then next to follow, being the said May term, 1894, was prepared under an order of said board of said county, which is as follows:

"Ordered by the board that the following-named persons be, and are hereby, selected to serve as petit jurors for the next term of the circuit court." Which said order of said board fails to show upon its face that the list so selected for the purposes aforesaid were selected from the registration roll of said county; said order fails to show that the said persons so named in said list were citizens of said county, or were selected according to the laws of the State, or that they were qualified voters, duly registered according to law, and further fails to show that they, the persons so selected, were so selected to serve in Boliver County, State aforesaid. Relator further states that the certificate of the circuit clerk of the said county, the sheriff of said county, and the chancery clerk of said county, which is attached to the list of names drawn from the jury box, constituting the petit jurors for the first week of said May term of circuit court of said county and copied in the minutes of the first day's proceedings of said court, is void—

First, because the circuit clerk, J. E. Ousley, did not personally attend the drawing of said list, but said certificate shows that he was represented in said drawing by deputy clerk. The statute prescribes that the circuit clerk shall officiate at said drawing, which must not be more than 15 days before first day of said term.

Second, because the said officers charged with the drawing of

16 said jurors failed to certify, as the law directs, "whether the envelopes containing the names appeared to have been opened or disfigured," and this list of names contained the names of the persons who were selected by the circuit court on the first day of said May term, 1894, as grand jurors, which grand jury presented relator on said indictment.

Relator charges that the said officers charged with the selection, listing, and drawing said jury list, preparatory to the holding of the said May term of said circuit court, willfully and intentionally excluded all colored men from the said list of jurors on account of the fact of their color, and that relator is a colored man and charged with murder, and that at the time the said jury list was selected, listed, and drawn, as aforesaid, there were in the county of Bolivar 1,300 or more duly registered colored voters in said county, and 300 white voters upon the registration roll of said county; the white voters registered did not outnumber the colored voters, and that had the registration roll been used as their guide, as the law directs, they would have drawn some colored voters' names, but to the prejudice of defendant in the indictment and relator herein, said colored voters were, on account of their color, purposely excluded, and no black person has been summoned to serve as such jurors in said county since the adoption of the new constitution on account of the great prejudice against the black race by those in authority and of the white race, and relator ask' subpœnas for said officers to prove same. Relator charges that his right to equal protection by the laws of the State, as guaranteed in article fourteen of the amend-

ments to the Constitution of the United States, was purposely ignored on account of his color and race, by the officers charged with the selection of said jury at said term. This he is ready to prove, and pray'
17 subpœnas for said officers.

That he is not indicted according to the due course of law of the said State, and therefore pray that his trial under said indictment be removed from this court to the United States circuit court for the western division of the southern district of the State of Mississippi, and that the record bear evidence of such an order of this court, and that said removal of said cause be granted by this court upon such terms and conditions as the law directs.

CHARLEY SMITH.

STATE OF MISSISSIPPI,
Bolivar County:

This day personally appeared before me, J. E. Ousley, circuit clerk of said county, Charley Smith, who makes oath that the facts set out in the foregoing petition are true to the best of his knowledge and information and belief.

CHARLEY SMITH.

Sworn to and subscribed this 29th day of November, 1894.

J. E. OUSLEY, *Clerk.*

(Endorsed:) 2810. State vs. Charley Smith. Murder. U. S. circuit court. Filed Nov. 29th, 1894. J. E. Ousley, clerk.

And upon the petition aforesaid, the following order was made by the court and entered in Minute Book "I," page 496, this 29th day of November, 1894, in words and figures, to wit:

18 STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on to be heard in the circuit court of Bolivar County, Miss., November term, 1894, upon setting the cause for trial of the indictment presented against him at the May term, 1894, by the grand jury of said county, and defendant then and there petitioned the court, verified by proper affidavit, for the removal of the trial of said indictment to the United States circuit court for the western division of the southern division of Mississippi, and, after hearing the same and the court, being sufficiently advised, doth order that the same be, and is hereby, overruled and denied; to which ruling of the said circuit court the defendant then and there excepted.

To which order of the court overruling said petition defendant then and there excepted.

Among other things the following order made, the waiving of a special venire, and copy of the indictment as appears in Minute Book "I," page 497, November 29th, 1894, in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

The defendant, having been formally arraigned on the indictment herein at the regular May term of this court, this day being in court in

person and by counsel, the defendant being asked whether or not
19 he would demand a special venire, answers that he waives and a special venire and a copy of the indictment and attachment to issue for Jack Shannan, at Hollendale, Washington County, and Delia Hunter, Coahoma County, at Clarke farm, be issued, returnable instanter.

On the 1st day of December, 1894, being a day of said term of court, defendant, being called upon to answer if he was ready for trial, the following application for postponement of his case to a future day of the term of said court, which is in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Now comes the defendant in this cause and moves the court that his trial herein be postponed to a future day of this term—

1st. Because of the absence of Kate Johnson, George Scofield, Wash Latt, witnesses for defendant, and material to his defence in this case. Defendant herein shows on the first day of the criminal term of this court, and before the State announced ready for trial, he had subpœnas issued for all of said witnesses, being the 29th day of Nov., 1894, and on the 1st day of Dec., 1894, the State for the first time during the criminal term made any announcement, and on investigation the defendant found that the sheriff had not made any return of the subpœnas for said witnesses, and *and* he can not safely go to trial without the testimony of said witnesses. He has used due diligence in the matter, and honestly believe' that if the case is postponed to a future day, or until the 3rd day of Dec., 1894, or any future period, that the sheriff will be able to
20 return the process personally served and the witnesses aforesaid will be in attendance.

CHARLES SMITH.

(Endorsed:) Filed Dec. 1st, 1894. J. E. Ousley, Clk. John L. Gill, D. C.

On motion for postponement of this trial, the following evidence was introduced in words and figures as follows, to wit:

ROBERT CLAYTON:

Knows Wash Latt; he has been gone since the shooting scrape; suppose he was one of the parties in the shooting; never been heard of since shooting in spring of 1893; never heard of him, and I have been right there, and that is where he lived; think that he was implicated in the shooting.

Cross-examination:

Q. Do you know that he was charged with that offense?

COURT. He ran away, did he; left the county?

21 A. I think he and Charley left together, and I think it can be proven that they went off together.

Q. The reason you say he is not in the county is because he is not in that immediate neighborhood?

A. He has not been seen since in the neighborhood; have no reason to make any inquiry of him specially; he might be in Hollendale, Miss., or at some other place, except around that immediate neighborhood.

SHIELDS. Hollendale is in Washington County and not in Bolivar?

A. Yes, sir.

GUS JONES:

Don't know that Charley and Wash Latt left together, but the last time I saw them they were together; said they were leaving; this was same night of the shooting. Charley was brought back afterwards. They got some money from me; said they were leaving the county. Have heard of Latt since at Hollendale, but nobody, I think, knew it positively. Hollendale is in Washington County. Never saw him since. Heard some parties say they saw them both there one night. These parties said they saw them there at one place about a month after the shooting. Two or three men said they met them one night on the railroad.

Cross-examined:

Wash Latt may be at Hollendale; could not swear he is not in jurisdiction of the court. It was claimed he was at Hollendale; this was only a rumor—don't know. (Subpœna introduced, issued for Wash Latt and others on part of the State, 17th of Nov., 1894, returned "not found." As to Wash Latt, it was admitted defendant did not issue
22 subpœna for Wash Latt until 28 Nov., 1894, this term of court.)

JOHN L. GILL, deputy circuit clerk:

From the record subpœnas issued for defendant's witnesses, including Wash Latt, 28 day of Nov., 1894, first day of criminal term of court; the parties were arrested before the last term of court. Defendant was represented by same counsel last court. Only time any record is shown of the issuance for Johnston is 28th day of Nov., 1894. Subpœna for George Scofield on part of defense was on 28th of Nov., 1894; no memorand' of Scofield being subpœna'd for defense before 28 Nov., '94. Several subpœnas have been issued for the other parties before that time. Defendant have had subpœnas issued for other parties before this term of court, but this is the first time any was issued for these three witnesses, as appears from my record. There may have been others issued by Ousley downstairs. Here is subpœna issued by me on 11th for all defendant's witnesses. It was issued to have the case tried just like I did for the State witnesses, so that there would be no continuances so far as the defendant's witnesses was concerned.

Cross-examined:

I have not examined through all the papers. They may be returned for all I know. I have not examined the subpœnas, as I put them in the papers as soon as they come in.

JACK SHANNON, for State, sworn:

Went to Hollendale to catch Wash Latt and Charley Smith. Wash was there, but Charley had gone on down towards New Orleans. After

Wash found that I had come there and was after him to catch him—
23 after being informed by his mother that I was after arresting him—
he fled towards Sunflower; never heard of him since. His mother don't know where he is. Witness lived in Hollendale. This attempt to catch him has been over a year ago.

Cross-examination:

Witness did not know whether Wash Latt was in Mississippi or not, but know he is not in Washington County. He may be in Mississippi. George Scofield is at home now in Hollendale, in Washington County; he is subject of dying; he came from New Orleans there with consumption, and has been at my house three months; if he gets up at all we have to pick him up out of bed.

SHIELDS (State). Q. He can't come to court; he is gradually dying?

A. Yes, sir; I do not expect to find him alive when I get home.

JONES (defense). Q. This man Scofield was alive when you saw him?

A. Yes, sir.

Q. Able to talk?

A. He could talk a little, mighty little.

Q. In county of Washington?

A. Yes, sir; he is right there in the county.

GEORGE P. MELCHIOR, sheriff:

Q. On the first day of the criminal term of this court, the 28th day of November, were you not given subpœnas for George Schofield, Johnston McCraney, Wash Latt, to serve for defendant?

A. I remember one for Johnston to serve for defendant; of course, I have no recollection of them, because I handle so many every day. The reason I remember Johnson, because it specified on the face of the
24 subpœna he lived near the Baptist Church, in Cleveland, and that writ went out that day, and will possibly be back to-day; it takes about three days to get service from that county.

Q. You sent several subpœnas to Washington County?

A. I think Leflore County also.

Q. And these subpœnas have not been returned?

A. I do not know whether they have or not; they were sent the same day they were issued. I sent them by mail.

Q. You have not had returns from the several counties?

A. Not that I know of; they were to be returned to the clerk. I do not handle the papers.

(The court overruled the motion for postponement and defendant excepted. During the trial the subpœna for Johnston was returned "not found.")

25 Whereupon the following order is made in Minute Book "I," page 505, overruling motion to postpone, in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on to be heard on motion to postpone his trial to a future day of the term, and the court being sufficiently advised, doth

therefore order that the same be overruled, and the court then and there stated that the defendant must proceed immediately to trial; the defendant then and there excepted to the ruling of said court.

This being overruled by the court, the defendant then and there excepted to said ruling of the court.

The weekly venire being called for the second week of said circuit court, defendant moved the court that same be quashed, which are in words and figures to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Now comes the defendant in this cause and moves the court that the venire of jurors summoned by the sheriff for the second week of the present term of this court be quashed.

1st. Because they have not been regularly drawn from the jury box by the officers of the county whose duty it is under the law to draw the venire for the said second week of said term, to wit, the chancery and circuit clerks and sheriff of the county, and that said list of the venire, as appears in the record of the first day's proceedings of the term,
26 is not certified to by the officers of the county charged with the selection of the jury as the law directs, but said jury as now answers to their call as said venire for said week is an illegal venire, and a trial by said jurors or any of them as such venire will be contrary to his rights under the constitution of the State of Mississippi and his rights under the Constitution of the United States, and that defendant being a citizen of the State of Mississippi and of the United States he insists upon his right to be tried for this offense by due course of law.

CHARLEY SMITH.

STATE OF MISSISSIPPI,
Bolivar County:

This day personally appeared before J. E. Ousley Charley Smith, who makes oath that the facts herein set out in the foregoing motion are true and correct to the best of his information and belief, and that his source of information is the record of the first day's proceedings of the Nov. term of the court.

* * * * * * *

Filed Dec. 1st, 1894.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

Whereupon the following order overruling motion to quash venire as appears in Minute B. "I," page 505, in words and figures to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on to be heard, before entering the trial or empannelling the jury, upon the motion of defendant to quash the venire of

jurors summoned for the second week of the term, and the court,
27 after hearing and considered the same and being sufficiently advised, doth order that the same be overruled, and the defendant then and there excepted.

On same day of trial, when the pannel was tendered defendant he moved the court that same be quashed. Said motion is in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Now comes the defendant in this cause and moves the court that the panel of jurors tendered the defendant to accept to try the indictment herein against him be quashed. 1st. Because the said jury is made up of persons whose names are upon the record as jurors for the second week of the said term of the court, and said list of jurors, constituting the venire for the second week of said term and so summoned by the sheriff of the county, was not drawn from the jury box of the county by the chancery clerk and circuit clerk and sheriff of the said county, which the law directs. Nor do the officers of said county charged with the drawing of said venire under the law, to wit, as aforesaid, certify to said list so appearing on the minutes of the first day of the said term, and there is no record that such list as does appear, purporting to be said venire for said week, was drawn from the jury box of the county, and said panel is void because composed of persons named being exclusively white jurors chosen on account of their color, as such jurors so illegally summoned to serve and now tendered defendant, he being a negro of the black race, and persons of his race and color were purposely, on account of their color, excluded
28 by said officers of the law. Defendant is a citizen of the State of Mississippi and of the United States, and insists upon his right to be tried by due course of law, as guaranteed him under the rights incorporated in the constitution of the State of Mississippi and the Constitution of the United States, and the panel now tendered him, from which members of his race are purposely excluded by the officers charged therewith for no other reason than their color, and that 1,500 colored men duly qualified to serve as jurors being in the county, to 500 whites, is an abridgment of his rights under the Federal Constitution.

CHARLEY SMITH.

STATE OF MISSISSIPPI,
Bolivar County:

This day personally appeared before J. E. Ousley, circuit clerk of the said county, Charles Smith, who makes oath that the facts set out in the foregoing motion are true and correct to the best of his knowledge and belief and information, and also from the records of the first day's minutes of this term of this court, which record is offered in evidence.

CHARLES SMITH.

Sworn to this the 1st day of Dec., 1894.

* * * * * * *

(Endorsed:) Filed Dec. 1st, 1894. J. E. Ousley, clerk. John L. Gill, D. C.

Whereupon the following order overruling motion to quash panel is entered in minute book "I," page 505, December 1st, 1894, in words and figures as follows, to wit:

29 STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on to be heard on motion of defendant when the panel of jurors was completed and tendered him for acceptance or rejection, and the court, after hearing the same, doth order that the same be overruled, the defendant then and there excepted.

On examining the jurors on their voi' dior, defendant excepted to Juror Norvel and others because the registration of the county at which they were last registered was ordered by the board of supervisors of Bolivar County upon the following order, passed in April, 1894:

"Ordered by the board, That the circuit clerk be, and is hereby, ordered to make a new and complete registration of the voters of the county, and said clerk to publish notice of the times and places of said registration."

Said order not showing the statutory necessity for such new registration.

All of said jurors were regularly registered at the time they registered again under the order of April, 1894.

The court overruled said exception to said jurors for cause, to which ruling the defendant then excepted.

In empannelling of the jury the defendant excepted to Juror Norvel because the registration of the county under which he last registered is an illegal registration under the law. Defendant offered to introduce record of supervisors to prove that it was an illegal registration
30 as ordered. Overruled. Excepted to by defendant.

SHIELDS. Were you registered before the registration last time?

A. Yes, sir.

This question was asked the first six jurors on the panel.

Q. Were you all registered in 1892, everyone on the jury? To which an answer in the affirmative was made.

The defendant asked to introduce order dated 3rd of April, 1894, which is in words and figures as follows, to wit:

"Ordered by the board that the circuit clerk be and is hereby ordered to make a new and complete registration of the voters of the county, and said clerk to publish notice of the times and places of said registration."

Q. Mr. Crowder, did you vote at last election?

A. No, sir.

(Objected by the State as incompetent. Sustained. Excepted by the defendant.)

It was considered that there has been no special election in the county since the order referred to.

Whereupon the following order appears on Minute Book "I," page 505, after empannelling the jury, in words and figures as follows, to wit, December 1st, 1894:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

After empannelling the petit jury in the above-styled cause for
31 trial, and before argument, court adjourned over until Monday morning at half-past eight a. m.

Brief of evidence.

JACK SHANNON, witness for State, sworn (co.):

I know Charley Smith; that is him there. Knew Wiley Nesbit in his life time. The murder of Nesbit, which Charley Smith is charged with, occurred on the 6 night of May; this May last gone one year ago; May, 1893, at Meregold Station, Bolivar County, Miss., about two hundred and fifty yards or three hundred yards from Meregold. Wiley was in the house when he was shot.

Q. Tell the jury how the killing occurred, and everything about it.

A. Well, Charley came into the house using some profane language; they were during and waiting for the train to go to Memphis. Coleman said: "Charley"——

(Objected by defendant to anything Coleman said *said*. Overruled. Exception by defendant.)

A. He says, "Charley, mind, don't talk that way; you have a wife."

Q. What was Charley saying?

A. He was saying some bad talk. Adam got up and walked close to Charley, saying, "You know that ain't right." Charley says, "That's all right, I take that back." Wash Latt says, standing off a piece, "Don't take back anything." Wash Latt says to Charley, "What you say first say," and Charley said nothing more. Adam said to Wash Latt, "What have you got to do with it. I am talking to Charley," and he says he had a whole God dam*m*ed lot to do with it, so says Wash Latt. Adam says, "If you want anything out of me come out of doors." Wash and he started out. Adam walked out. Wash came out, his pistol
32 in his pocket. Charley run his hand in his pocket and pulled it out. Charley had a .45 Colts on his side, and he was going out doors, and drew it.

Q. He and Wash went out together and they drew their pistols?

A. Yes, sir; Charley was standing on this side and Wash on the other, Adam right in the middle; some of them hollowed and said, "Go out there and don't let—" I could not tell who said it, there were so many people in the house, and when he says "Go out there, somebody, don't let him kill him," I reached up and got the lamp, and Walter Luddy standing by the door. I said, "Walter, give me your pistol and let me go out and stop this fuss," and he gave me his pistol and I called to Charley and said, tell him to stop. Charley had his pistol on Adam just so [in pointing a position at Adam]; had his pistol pointed at Adam and said, "Don't move." Wash had a pistol on Adam, also; I said, "Charley, take your pis-

tol off of Adam," and he says "That is all right; what I want to do that for." I said that is a hell of an affair; both of them had their pistols on him, and he took it down and walked around until he got close up to me, and when he got close enough to me he blowed the light out. Charley blew the light out and was standing on this side of me, and when he walked around and got on this side, and blowed the light out, and backed around and broke and ran around the corner of the house; that was on the left side of me first when I went out. I went with my face this way, and he was standing that way, and he said all right, and came walking up to me and blew the light out, and took around the corner of the house. As
33 soon as he blew out the light, Wash. Latt shot at Adam; Charley now shot; he went around the house, and when he got around the house he shot three shots.

Q. What became of those shots?

A. He never hit Adam then. I don't know whether he was shooting towards me or not; it was lightening and raining, and he was shooting towards me, and I stooped down. I seen the flash of the pistol, and when I seen him peep around the corner of the house the pistol fired three times. He never shot at Adam then; he shot at me. When he shot plum straight, I reckon Adam must have shot close to him; he shot three or four holes in his hat, and Wash took and run and jumped over the fence. Wash Latt never ran around the house at all until he had nearly emptied his pistol, and he run to the fence and jumped over. I don't know where he went. I then got plum on the gallery. Charley went and peeped around again, and I saw them, and when he went and peeped around again I shot at him as he went under the house. I reckon he must have loaded his pistol, and when he came out he had it full. Adam and John McGuirk were tusseling. He tried to get Adam's pistol, and when he came out he just pointed up and shot Adam. Adam had hold of the handle of the pistol. Charley shot Adam right in there, and his ball struck the handle of the pistol.

Q. Adam's pistol fell out of his hand?

A. And it knocked his pistol as far as that gentleman, and Adam got down on his knees and commenced to feel for it, and said, "I am shot;" and a little while he got up and went into the house and said, "Boys, I am shot to death." Adam Coleman says, "I am shot to death."
34 Then the shooting all stopped for a while, about 15 minutes. All the folks were in the house except the women, who were running across the field and hollering. I asked who had cartridges. I went in the house to get some cartridges, and none of the boys had any, and I came to the front door. The front door was shut. John McGurk opened the front door. It was lightening, and he came from the corner of the house—Charley came from the corner of the house and made to the fence right in front of the house, about 50 feet from the house. I saw him get over the fence. The door was open, and he had not got to the fence. John says, "Yonder he is now;" and he jumped over the fence. I slammed the door—I shut the door together. I was inside the house standing by the door—by the side of the door facing, and old man John started to the door, and I pushed him back, and said, "Get away from there," and the moment I said that there was a fire through the door—two; first made through the door and the second fire made through the

door. Then I walked across there, going to the middle door, and Wiley Nesbit was mighty near the middle door, and he done this way [stooping over], and said, "I am shot to death;" and I said, "No you ain't;" and I looked down in front of him and there was a piece of fat that the bullet had pulled out and was swinging down, and he fell to the floor, and I said, "He certainly is shot."

Q. That was the shot that went through the door that hit him?

A. Yes, sir; hit him in the back. Nesbit was about as far from the door as to Charley there (about 20 feet). The house, I reckon, was about 16 x 18, and he (Nesbit) was about 6 feet from the middle door.

35 Just as I shut the door, and as I shut the door, before a man could speak a word, there was a shot through the door. The first shot hit nobody; the second shot, Wiley. Nesbit said, "There!" Some of the boys picked him up and took him out, and carried him to old man Bates' house. Don't know how long he lived after that, exactly. It was about 3 o'clock. I don't know what time he died, because I went to Memphis that morning, and he was dead when I got back. Shooting was on Saturday night; he died on Sunday evening. Did not see Charley Smith any more after this shot was fired. I next saw him when he was brought back. It was more than a year afterwards, and he was under arrest. John McGuirk was there.

Cross-examination:

Q. You stated when you saw Charley get over the fence you shut the door?

A. I shut the door.

Q. That is what you stated.

A. No, sir; I said when I opened the door I saw Charley Smith mighty near to the fence.

Q. Did you see him get over the fence?

A. I saw him when he climbed up on the fence.

Q. Then what did you do?

A. When he climbed up on the fence said, "There he is," and I slammed the door. John said that, and he got over the fence and I slammed the door together. It was right in front of the door, and I slammed the door together before a man could speak a word. There was a shot made through the door. Had seen nobody get over the fence before that but Wash Latt; but Latt did not get over where he got over. That was in the fuss nobody but Adam, Wash, Charley, and me was in the front yard.

36 Q. You heard two shots, and the second shot you heard the deceased say he was shot?

A. After the first racket of the shooting there was nobody outdoors at all as I seen; all them were in the house. All them that were outdoors were making their way across the fields, but they were outside of the house; I did not see them. Saw one man I could recognize; that was Charley. I did not see anyone shoot, and did not see him shoot. I can not say he made the two shots, because I was in the house and could not tell who made them. The house, a cabin, with a shed room to it. Nesbit was standing in front of the middle door, near the front door. Back there a table sat right across the room, and he was near the table when he went down under the table. I suppose he was 3½ feet from the

table. He went to weaken and going down, and when he went down he had this hand on the table. He was shot in the spine, and the bullet came out of his belly by the naval, went on through the room, and went through a flour barrel. Wash and Charley were the first I saw pull a pistol after going outdoors. I saw only three pistols when I got outdoors.

Q. When you got outdoors how many did you see there?

A. Only saw four. I don't know how many shots were fired at first shooting. There was a whole lot made; more than six. There is a gallery to the house. House sits north and south; chimney on the north; gallery was towards east, sunrise. Charley, when he came out of the house, went down to the south corner, at the front end of the gallery; the southeast corner; it is on the side the sun rises on. He
37 jumped off the gallery and went out in the yard after he blowed the light out. He went around the corner of the house, and when he b'owed the light out and ran around the house Wash made the first fire. Adam Coleman made the second fire. Adam was in the house when Nesbit was shot. He had run out and got in the field somewhere. It was raining and thundering and lightning; a man could hardly see his hands. Was about 30 feet from Wash Latt when the first shot was. Wash was standing toward the far end of the gallery, on the south end; Charley was standing at this end, and Adam was standing in the middle of them. Charley was shooting across the gallery at me. Had had no words with him; could not tell why he was shooting at me; know who he was shooting at from reports of his pistol and the way the blaze was coming. He must have been shooting at me.

Q. You said a minute ago that it was dark when the lamp was blown out, and one could not distinctly tell whether it was you or anyone else, could they?

A. I don't suppose; he was not on the gallery; I was not on the gallery, I was on the ground. I went to him on the ground. The only shots I saw Charley make was towards me. Don't know whether he shot Nesbit or not; never had anything against Charley.

Q. When Charley was out in the yard, shooting in the direction you were standing, you had no reason to believe he was shooting at you?

A. I do not know. A man shooting in the dark at a man, and the blaze coming towards me, I would have to protect myself.

38 Redirect examination:

Q. This man, Wash Latt, had got over the fence and goine in a different direction.

A. He jumped over the fence on the south end of the yard. It was in front of the door that Charley Smith got over the fence. A man could not more than speak a word from time I saw Charley get over the fence before the shots were fired through the door, from the direction where he got over the fence.

Recross:

Q. After Wash Latt got over the fence did you see him any more?

A. No, sir; never saw him; didn't know where he was at the time this shot was made.

JOHN MCGUIRK, State witness, sworn (col.):

Was at the dance at Meregold the night Wiley Nesbit was killed; saw Charley when he jumped the fence and ran around in front of the door and began to shoot in the door about the time Wiley was shot.

Q. Tell the jury how you saw it. You saw Charley jump across the fence?

A. He got over the fence and ran around in front of the front door, and that is the time Wiley got shot. I reckon it was about 3 or 4 or 5 minutes after the first fireing which had been going on out there. I had started in the door to go home. I saw Charley when he jumped
39 the fence and ran around in front of the door and began shooting in the door, and I thought he would hit me, and I pushed the door and started to go back in the house, and that time Wiley grabbed his stomach, and said, I am shot. Don't know how many shots he made; I remember him making two shots. The door was open when the last shots were fired; shots ranged low, about a man's waist. I saw where the shots went, right by the side of me. Charley left. I never saw him any more until I seen him with Mr. Boyd, arrested, close on to a year. Nesbit died; I saw him after he di'd; saw his dead body. He was shot through the bowels; died Sunday evening, next day after he was shot.

Cross-examination:

Q. Have you seen Wash Latt since.

A. I have not seen him since that night; was standing just outside door when the last shots were made; don't remember how close I was to Jack Shannon, but I think he came out by me outside of the door and asked me, Where is he? Don't remember whether I was close to Jack Shannon or not at time of last shots.

Q. Who went in the door first, you or Jack Shannon?

A. I was already at the house; Jack was on the outside; I went out the door before Jack came in.

Q. You went out first before Jack came in the door?

A. I went out of the house before Jack, and Jack came out behind me and hollered, Where is he?

Q. Who came back in the house first, then?

A. I don't know which way Jack went then; I think he went outdoors.

Q. Then Jack was not in the house when the shots fired last, but was on the outside.

40 Not as I remember; I don't remember whether he was in the house or not, but when he came out behind me he kept right on outdoors.

COURT. Had the shots been fired then?

No, sir; Jack kept on outdoors. I stood there awhile.

When did you go in the door?

When Charley began to shoot.

Where were you standing while Charley made the first fire?

I was standing right at the door.

On the outside or inside?

On the outside; the door was closed. I did not see Jack any more until the two shots were made. I was on the gallery when they were made.

Jack Shannon was not standing at the door, and closing the door at the time Charley made the second shot, was he?

No, sir.

That was a dark night, was it?

Yes; a little dark. That was the first time I had been out on the gallery after the fuss commenced in the house; was in the house when the fuss originated; can't remember the names of all the men that were in the house that night at that time; Adam, Charley, and Wash Latt—that is all I remember there, because they were talking in the house; did not see Wash Latt outdoors; did not see Adam Coleman; did not see Wash Latt get over the fence; do not know where Adam Coleman or Wash Latt were at the time the shots were made.

You don't know but what they might have been over the fence where Charley got over?

They were not there; there was nobody there but Charley; the fence was not 35 feet from the house; it was not a very dark night; a little cloudy; don't think it was thundering and lightning about that
41 time; the fence is plank, about shoulder high (5 feet); I looking in the direction of Charley at the time of shooting; he was standing up just so, shooting towards the door; next saw Jack Shannon in the house at the end of the table in the shed room; was not directly in front of the middle door; he was behind the middle wall of *of* the house.

Were you shot that night?

Yes, sir; I reckon it was the shot; something struck me here and hurt me mighty bad and burned; was standing in the door when shot, which was before the two last shots; the shot did not pass through me; it was a glancing shot, burned the skin a little. The time Jack Shannon came out the door behind me was the first time he had been out that night, to my recollection; the first time he came out with lamp and remained out four or five minutes; I saw Jack come out the house once before the time just before the last two shots.

Did you see Jack any more that night anywhere on the front or around about the front door?

After he went out with the light the next time I saw him he came out right behind me out of the front door.

How long after he came out the second time was it before the last two shots were made?

About a minute or two.

Redirect examination:

Shannon came out fu'st with his lantern, and witness don't know how he got back into the house, and that he (witness) went out of the
42 house ahead of him (Shannon), and about that time I got out there the shooting commenced.

Then, when you tried to get in the door the second time the second shot was fired?

Yes, sir.

JOHNSTON MCCRANEY, witness for State, sworn (col.):

I was at Meregold the night Nesby was shot; he was shot at the ball; I was in the room; the house had two rooms to it, and I heard this man,

Adam Coleman, tell Charley Smith, the first I knew of anything about a fracas, I heard him tell Charley Smith that he ought to respect these women. Charley said to Adam, "That is all right, Adam," and Wash Latt walked up and said, "Charley, don't take back a damned thing you said," and Adam says, "Well, Wash, I don't give a damned for you any more than I do Charley," and he says, "You ain't no man like me; you walk outdoors;" and they all walked outdoors, and in a short while after they all got outdoors they all commenced to talking and cussing, saying, "By God," and so on, and a lot more. I then started out the back door, and time I got to the gate the pistols commenced fireing, and I ran away from there; did not see Charley Smith any more after that; saw Adam going outdoors; saw Adam Coleman next day shot in the hand; do not know where Adam Coleman is now; heard he was in Laflore County last I heard of him; never saw Charley Smith any more until he came back under arrest.

Cross-examination:

43 Could not tell the number of shots fired; looked like a whole lot, like a little package of firecrackers, say about 25 or 30 shots, one after another; heard two shots after I had gone about 175 yards; do not know who fired them; they were fired at the house; the men who went out of the house first were Charley Smith, Wash Latt, Adam Coleman, Jack Shannon, John McGuirk; they all went out behind one another.

GRANT PORTER, witness for State, sworn (col.):

Charley Smith and a woman had a fuss; Adam Coleman came up to stop him; Charley, he, and Wash Latt commenced to cuss one another, and went outdoors to settle it. They had pistols, and after they went out there a few minutes Jack Shannon carried a light out, and they blowed the light out and commenced shooting. Saw Charley blow the light out. The people commenced running back in the house. They stopped shooting after a while. In about fifteen minutes Nesbit was walking across the house to the middle door, and at that time two shots were fired, and he says he was shot and squatted right down by the second door in the house. He was shot through the back.

COURT. Shot from behind and came out in front?

Yes, sir. He was shot 2 o'clock Sunday morning; lived until 6 o'clock Sunday evening. Saw him after he was dead. Wash Latt was outdoors somewhere. Charley Smith was outdoors, too. Adam Coleman was in the house at the time Nesby was shot. Coleman, he came

44 in the house and had gone over to another house when Wiley was shot. He went out there and some fellows took him over there, and directly after he went out Jack Shannon slammed the door and Wiley Nesby went across the house and before he got to the second door he was shot. Jack Shannon slammed the door.

Cross-examination:

Where was John McGuirk at that time?

He was out on the porch; nobody was outdoors but Jack Shannon, Wash Latt, and Adam Coleman.

Who else was on the gallery at the time?

John McGuirk was standing there, and when the shots were made John McGuirk had just gone outdoors, when he slammed the door.

You did not see who it was that made the last two shots?

I only saw Jack Shannon; the fence is about 25 feet from the gallery; I guess it was dark and rainy.

Were you on the gallery at the time John McGuirk was shot?

Yes, sir; and a lot of others; after the light was blown out all ran back in the house off the gallery, also John McGuirk, and John had just stepped back out the door when these last two shots were fired; saw Charley Smith no more after he went out.

BRADLEY JONES, for State, witness sworn:

Remember the night Wiley Nesby was shot; I was at home
45 in bed; I saw Charley Smith next morning about 4 o'clock with Wash Latt; saw him on our gallery, a mile and a half or two miles from the place Nesby was shot.

Charley called for Gus Jones; I woke Gus up. He asked for five dollars. Gus gave him the five dollars, then when he handed him the five dollars Charley commenced crying, says, "I have killed four or five men;" says "I killed Adam Coleman, John McGuirk, and several others," and walked off. He said he had Adam's pistol; showed it to Gus; and never saw them after that night until Charley was arrested. Never saw Wash Latt.

BEN JOHNSON, witness for State (col.):

I was at the ball the night Nesby was killed. I first knew of it; there was a woman, Julia, sitting in George Seals' lap; I saw her tumbling out of his lap, and when I got near them something was said. Charley says, "That is all right," and Wash Latt, he says, "If you are a man be a man; don't take back nothing;" and he says, "I am as good a man as there is in the house;" and Adam he says, "Wash, what have you got to do with it?" and he says, "I have got nothing to say, but if you don't believe it walk out;" and they both walked out the door. Charley went out behind them, and Jack Shannon grabbed a lamp and went out and was standing on the edge of the gallery, and I got to the door and heard Adam say, "Charley, don't you come up with anything." Charley started towards the lamp and blowed it out; he had his pistol in this position,
and I looked back at Wash, and that time the shooting commenced
46 and I ran in the house, and after that, before the next shooting started, Jack Shannon broke in the door, and I seen Charley run and jump over the fence. That time Jack slammed the door and I could not see out any more. There was a couple of shots and a fellow named Nesby turned around and said, "Oh, I am shot." Did not stay to see what happened. Saw Charley brought to Merigold, by Mr. Boyd, under arrest.

Cross-examination:

Where was John McGuirk when the last shots were made?

I don't know, sir.

Could not tell where Wash Latt was at time of the last two shots?

Jack Shannon was inside of the house when last two shots were made; could see to the fence from the house by light; it was a sort of a cloudy

night; if there was no light I do not know whether I could see or not. I saw the ball with which Nesby was shot; pretty good-sized ball. Jack probably had his pistol that night; did not see Jack shoot; don't know where I was standing when John McGuirk got shot. Charley Smith had a .45 caliber; Wash Latt had a .38 pistol; I saw the ball afterwards; it was sort battered.

GUS JONES, witness for the State, sworn (col.):

Saw Charley Smith and Wash Latt after the shooting on same night at Merigold; saw them at Mrs. Jones'. Charley said he wanted some money to go off on an excursion to Memphis. After he got the money he said he had to leave; that he had killed three or four men at Merigold.

47 Cross-examination:

Said he had killed Adam Coleman, Jack Shannon, and John McGuirk; I remember that; did not say he had killed Nesby.

JACK SHANNON, for State:

What sized pistol did Charley Smith own and carry that night?

.45 Colt's, Adam Coleman's pistol a .41, Wash Latt a .38 Smith and Wesson.

Cross-examination:

Can swear that I can tell a .41 from a .44 cartridge; it was a .44 or .45 calibre that passed through Nesby, and not a .41 ball; was not mashed after passing through Nesby.

MAT THORNTON, witness for State:

Had no talk with Charley Smith about the killing; he talked to me about it.

What did he tell you about it?

He told me that he killed a man over at Merigold, and had to leave there, at a ball, and he went to the depot when he first shot him; he run out and hollered, "You shot me," telling another man that he shot him, and the other man said, "Charley Smith shot me," and he said, "No, you shot me;" and Charley Smith said he stepped out from under the depot and said, "I shot you, God damned you;" told me that in the jail. Charley said the man he shot was at a ball, inside the house; said the man was Wiley; he did not call his other name; witness was in jail.

Cross-examination:

48 Who was present when Charley Smith had that conversation with you in jail?

Nobody but me and Charley were lying in his bunk; others were in the cell, but nobody heard this but me.

What more did he say in that conversation?

(Objection sustained.)

BRADLEY JONES, witness for State, sworn (white):

Charley Smith's pistol was a 45 I should suppose; 45 Colt's. I think the one he had of Adam Coleman's is 38 cal. Won't state positively, but think the one was smaller than the other.

RABE JONES, witness for State, sworn (col.):

Was there the night Nesby was killed, time about 9 or 10 o'clock; little while before the shooting saw Wash Latt after I went out the back door of the house out in yard at a shed about one hundred yards from the house. Latt stayed there until all the shooting was over. He went out with the others at first, and after some of the shots had been fired he came to the shed.

Cross-examination:

There were lots of shots made; don't know whether they were after he left there or not.

State rested.

ROBERT CLAYTON, witness for defendant, sworn (white):

Remember the night Wiley Nesby was killed. Was at the house. Was not in front nor never saw him at all. Few minutes after I got in the house I heard a quarrel among the darkies; in an instant the fireing
49 commenced, and it was fearful; forty or fifty shots; saw John McGuirk not in time of the rookus; saw three men relooading their pistols; after they had emptied their pistols they came back in the shed room and re-loaded and went out again; did not see Charley Smith; they were men engaged in the shooting, but don't know them; they just quickly reloaded their guns and went back.

Cross-examination:

Ran in the house out of the rain; it seemed the most of the fireing was in the front room. I did not go further than the shed room, entering back door; don't recollect all that occurred there that night.

Redirect examination:

I know positively Charley Smith was not one of those to come back in the room and reload, for I know him.

Recross:

Were you drinking some that night?

I was a little full.

JONES. You were not too full to know a man when you saw him?

No; I had my right senses.

JACK BARNARD, witness for deft., sworn (col.):

Remember the night Nesby was killed at Merigold. I saw two large-sized men walk out on the gallery. Smith walked out behind them. I was standing on the gallery when he walked out; then threw his hand that way, and as he walked behind the corner of the house he said, "Get back, Charley," and I stepped off and goes right on to old man
50 Bates' house. As I stepped off the gallery the fireing commenced; 25 or 30 shots. This man threw his pistol on Charley and presented it; I walked off; his name was Adam.

Cross-examination:

You are in jail, are you?

I am in same cell with Charley Smith. Was at the ball the night Nesby was killed. Fu'st I saw Adam, the other was Wash Latt, walked

out; Charley Smith went out behind; Charley walked out behind; Charley walked out behind; he (Coleman) threw his pistol on Charley and said, "Get back, Charley." I was on the front gallery; did not see Charley have his pistol out; did not see Charley on one side of Adam Coleman and Wash Latt on the other; did not stay there all the time; left before the firing commenced; was not there on the gallery when Jack Shannon brought the light out.

WILL TUTRON, witness for defendant, sworn (col.):

I was present at the house at Merigold the night Nesby was killed; saw three men get into a row—Charley Smith, Adam Coleman, and Wash Latt; they went outdoors to settle it; Jack Shannon went out with a lamp; shortly after he got out there the shooting started; afterwards shooting ceased, and afterwards one shot was made and Wiley Nesby was standing in the middle door of the house; grabbed his stomach after that shot and said, "I am shot," and weaken' down. Don't know who did the shooting; shortly after the man was shot Jack Shannon came in the room where I was.

Cross-examination:

51 Wash Latt, Adam Coleman, and Charley Smith came out of the house together. Coleman might have been in the house at the time of the shooting; last two shots might have entered the front door of the house.

SAM SWANN, witness for defendant, sworn (col.):

Remember the night Nesby was killed. I was in back room and they all walked out.

COURT. You saw them walk out?

No, sir; as they all went out I heard a noise, and I went up to Wash Latt and told him I would not have any fuss. He told me to keep back. When I ran I got about halfway around the house, and before I got to the back door the shooting commenced. I ran back in the house and did not come out any more until day. The time witness started to speak to Wash Latt he had backed up in the dark by a tree. Suppose he had something. Did not see anything. The number of shots heard after witness started to speak to Wash Latt was about 25—like a match to a bunch of firecrackers. Was standing in back room of the house when Nesby was shot. The front door of the house through which two last shots were shot, which killed Nesby, that door was shut at the time the two shots were made. Witness saw Robert Clayton in the house (white witness for defendant). Clayton was in the back room of the house.

Cross-examination:

Witness was pretty scared; very much frightened. Don't know whether bullet went through Nesby or not. This tree which Wash Latt was standing behind was near in front of the door, as near in front of the door as six feet (approximately).

52 Was it in front of the gallery?

Yes, sir; it was between the fence and the door. Wash Latt, Adam Coleman, and Charley Smith were all out there; all were not standing by the tree; Adam Coleman was standing about ten steps from Charley Smith.

WILEY HAMILTON, witness for deft. (col.), sworn:

I am staying at county jail. I stay in the cell, on this side of the cell [meaning] the cell Charley Smith staid in.

Have you ever seen Charley and Mat Thornton talking in Charley's ———?

Never did see Mat Thornton in Charlie's bunk; never see them have any talk in the bunk.

Have you ever heard Charley Smith discuss his case to Mat Thornton?

I have heard him talk his case in there, but I don't know that he was discussing it with Matt Thornton any more than he was anybody else. I heard him telling about his case.

Did you hear him in that conversation say he killed Wiley Nesby?

(Objected to; sustained.)

Charley talked about his case generally, but no private conversations were had with Matt Thornton.

Cross-examination:

Never in my life heard Charley Smith in any private conversation about his case; for when they would be talking privately I would be present and would know the nature of the subject.

CHARLEY SMITH, witness in his own behalf, duly sworn (col.);

53 On the night in question, at a ball at Merigold, I went into the house and was making some kind of an oath in the house, and Adam Coleman walked up to me and told me he thought I ought to have some respect; I said, "That is all right;" and that time Wash Latt spoke and said, "By God, say what you damn*d* please, I am as good a man as is in the house." Adam Coleman says, "You are a God damned liar, I do not believe it." Wash Latt says, "I am;" he says, "Step out doors." Adam Coleman and Wash Latt goes out and Jack Shannon behind them—Adam Coleman went first, Wash Latt behind him, Jack Shannon behind Latt—and when I got to the door Adam Coleman was about five feet from the front of the house with his revolver in his hand; the minute I stepped on the gallery he throws his revolver down on me and says, "Get back;" I jumped off the gallery at the southern corner, and he fires at me; when he fired I guess there were then forty or fifty shots fired; after the shots ceased I got up, and when I started out I went to get over the fence and two more shots were fired. I fell down on the outside of the fence and heard somebody say, "You God damned son of a bitch, I got you." I said, "Don't," when I came to see it was Wash Latt; I said, "Who is that;" he said, "This is me." As I came over the fence two shots were fired, and I fell down on the side of the fence, and he says, "You God danmed son of a bitch, I got you;" I said, "Who is that;" he said, "It is me," and he recognized me and stopped firing.

Were you on good terms with this man Nesby?

Yes, sir. When I went to get some money I told Gus we all had a fight; a lot of the boys had a big shooting scrape. I told him they were
54 Adam Coleman, Wash Latt, and I, and I said fifteen or sixteen; I said the whole saw-mill gang; he asked if anybody got killed, I said I don't know.

From the way the shooting occurred and the number of shots fired you did not know who was shot or who was not?

No, sir; I did not; because I did not stay to see who was shot; everybody was running after the shooting commenced.

But you are positive when you went to get over the fence, and as you got over it was then these two shots were made?

Yes, sir; these two shots were made as I got down off the fence. I fell off the fence.

You saw who made these shots?

Yes, sir.

Who was it?

Wash Latt.

What calibre pistol did he have?

A .44 Smith and Wesson.

"The clerk will copy the cross-examination of the witness Charley Smith verbatim from the evidence typewritten by stenographer."

Which are in words and figures as follows:

How do you know he had a .44?

Because he stayed with me.

Didn't you have a .44 too?

No, sir.

Yours was a .38?

No, sir; mine was a .45.

You had a .45 pistol, and Wash Latt had a .44 Smith and Wesson?

Yes, sir; I am sure of that.

Wash Latt and Adam Coleman went out of the house first and you went out after them?

I went out after Jack Shannon.

Didn't Jack go out with a light?

No, sir; he did not have a light.

Didn't you blow out the light?

55 I blowed out the light; he went out of the door first without any light, and he went back and got a light from , and he came out with the light afterwards.

When he came out with the light what did he do—Jack Shannon?

He came out with the lamp in his hand and pistol in this hand.

Lamp in the right hand and pistol in the left?

No, sir; lamp in his left and pistol in his right.

I mean the pistol in the left hand and lamp in the right.

I said lamp in the left hand and pistol in the right.

What did he do?

He came out there and said, by God, he was going to stand by Adam, and wasn't a son of a bitch going to do anything to him.

What were you doing to Adam?

Nothing. Adam was trying to shoot Wash Latt.

What was to prevent him shooting Wash Latt?

I do not know.

What was he doing?

He had his pistol pointed at him.

Had his pistol pointed on him?

Trying to shoot him. I stepped out of the door, and he backed back and took it off of Latt and out it came.

Adam, when you stepped out of the door, had his pistol pointed on Latt?

He had it in the position of shooting. I do not think he pulled the trigger. Wash was standing up there with both hands down.

Didn't have a pistol in his hand?

No, sir.

Adam did not shoot him?

No, sir.

When Shannon run out what did he do?

He came out and said, "God damn, stand back, I am with you; ain't no son of a bitch going to do nothing."

What did he do?

He held a pistol in his hand.

56 And Wash Latt all the time had his hands down, and Adam had a pistol pointed at Latt?

Adam reversed it on me, and said, "Get back, Charley," and I goes down the gallery and jumps off.

When Adam put his pistol on you, and he said, "Get back, Charley," now what did Shannon do?

He just steps back of the gallery and gets a lamp from——

He did not shoot at you or Wash Latt?

Not at the time.

Adam Coleman did not shoot at Wash Latt. Not at that time, or at you. Now, Jack gets the light and brings it out. When he brings out the light what does he say?

When Jack Shamon brings out the light Adam Coleman fired.

Now, don't you know it to be a fact you went up and blew that light?

No, sir.

Who blew out the light?

I do not know, sir.

Was the light blown out?

The light went out, but I was not there when the light went out; I was in the house.

Had any shooting occurred when you went in the house?

Yes, sir.

Who had shot?

I can't tell you; there was over twenty shots fired.

Who was there shooting?

There was John McGuirk, Adam Coleman, Richard Morrell, Robert Maxwell.

Were they shooting at each other?

No, sir.

Who were shooting?

This gang. I reckon shooting at me and Wash Latt. As I left the gallery they shot at me.

Wash Latt was standing up there with his hands still down, and all these fellows were shooting at him?

No, sir; not shooting at him when he had his hands down.
57 After I jumped off of the gallery the first fire was made, and Jack Shannon came out there. There was no shooting until Jack Shannon went in the house and came out with the lamp.

You hav'n't answered the question.

What did you say?

Is it not a fact they commenced shooting at Wash Latt? When the shooting commenced, you all got immediately in great confusion?

Whenever they commenced shooting at him Adam Coleman was the first man who fired.

What did Wash Latt do when Adam fired at him?

He run; he got to the corner of the house and commenced shooting.

Where were you all the time?

I was underneath the house.

You did not do any of the shooting?

Yes, sir.

Who did you shoot at?

I was shooting at anybody; I was shooting around in the crowd; everybody was shooting.

How many shots were fired?

Forty or fifty. It was a regular riot; everybody at the ball that had a gun was shooting.

Were you trying to kill anybody you could?

No, sir; not exactly. I was not trying to kill anybody.

What were you shooting at them for?

To be shooting; not to kill nobody.

You were shooting in the crowd?

No, sir.

Didn't you say you were under the house?

I did go under the house.

How could you shoot across the gallery when under the house?
58 I was not under the house when I was shooting.

Didn't you say a while ago you were?

I went under the house.

Didn't you say you were under the house when you did the shooting?

No, sir.

Did you come out from under the house and then shoot?

Yes, sir; I shot two times before I went under the house—three times.

Didn't you say a while ago you did not shoot a time at all until you went under the house?

No, sir.

You shot three times before you went under the house?

Yes, sir.

Who did you shoot at?

Adam Coleman was the man I wanted to shoot at. He shot at me first; as I came out of the front door he shot at me.

Adam Coleman shot at you as you came out of the front door; did he shoot at you first before he shot at anybody else?

Yes, sir.

Didn't you say a while ago the first shot was fired was when Adam Coleman shot at Wash Latt?

A. No, sir.
What did you say?
Adam Coleman came out of the door first and Wash Latt——
You have gone over all that.
I told you Adam Coleman came out of the door first and Wash Latt came out behind him and Jack Shannon. When I hit the front door Adam Coleman was on the ground about five feet from the steps as you come on the gallery, and as I brushed out of the front door Adam Coleman had his gun in position on Wash; they went out to fight; he
59 had *he had* his gun in Wash's face and he throwed it off of Wash as I came to the door, an' said "Get back;" and I goes down the gallery, and as stepped off the end of the gallery he fired at me and I turned and repeated the fire,
You did not say a while ago that the first shot fired was when Adam Coleman fired at Latt?
No, sir.
The first shot he fired was fired at you?
Yes, sir.
When was the second shot?
I could not tell you; it was a regular riot.
You run under the house?
I shot three times; my intention was to shoot at Adam Coleman.
You did not hit him once?
No, sir.
Did he shoot at you any more?
He must have.
Did he shoot you any more?
I could not tell; there was probably forty or fifty shots fired; I went under the house and stayed until the first shooting was over.
Now, you came out; where did you go when you came out?
I started to go home.
Who did you meet?
Did not meet no one until I started over the fence.
Was Adam Coleman out there?
If he was I did not see him.
Where was Wash Latt?
I did not see him until after the two shots were made.
You were just about to get over the fence?
Got over the fence.
The fence was some distance off from the front door?
It was about as far from the front door as to that door there; not quite.
60 The fence is that far from the front door. You were at that fence when these shots were fired?
Yes, sir.
And you fell down?
On the outside of the fence.
And Wash Latt said, "I got you?"
"You dam' son of a bitch, got you," shooting at me.
Said "I have got you," and then you jumped up and told him who you were?

Yes, sir.

The bullets passed by you?

I could not tell whether they passed by me or not; he was shooting right at me.

How many times did he shoot?

He shot twice.

Where was he?

On the outside of the fence.

The fence run along in front of the door as far as that door yonder?

Near about it.

He was on the outside of the fence, too?

After I saw him he was.

Now, say, for instance, here goes the fence and there is the door; now, you run to get over the fence and Wash Latt was about here?

Out from me.

How much further out?

I do not know; I guess some thirty-five or forty feet straight out in front of me.

When you went to get over the fence, here, the door was over there, and he shot at you?

The door was right here.

He shot at you?

Yes, sir; twice.

When did he shoot at you, when you fell down?

When I was falling down from the fence.

Just as you were falling over the fence he shot?

Twice.

61 How high was the gallery—the door was up there on the gallery?

Yes, sir; I think it is about three feet high.

You were falling on the ground when he shot at you?

As I got on top of the fence and started over the first shot fired and I fell on the ground, and the second one came.

What did you do then?

I went on.

Didn't you go to Gus Jones' house early next morning?

It was night.

That same night?

Yes, sir.

Didn't you call Gus Jones out there and tell him you wanted five dollars?

No, sir; I did not tell him I wanted five.

Didn't he give you five?

Yes, sir.

Didn't you say you wanted to go to Memphis, and wanted to get a five, and tell him you had to leave because you had killed three or four men there?

No, sir.

You did not tell him you had killed anybody?

No, sir.

Wash Lott did not say he had killed anybody?

No, sir. All the talking that was done at Gus' house I did.

Jones did not hear you tell Gus Jones you had killed four or five men, and you did not name over the men you had killed?

No, sir.

You did not tell him you had killed John McGuirk, and did not tell him you had killed Jack Shannon?

No, sir; I told him we were all in a fight.

You did not tell him you had to leave the country because of that?

No, sir.

Why did you leave the county?

What I told Gus, because everybody else was running that night.

62 Did everybody else leave *leave* the country?

Everybody was running away from there.

Why did you leave the county if you had not killed any one or done anything?

Because I did not want to be arrested for shooting no more than any of the rest.

You had not killed anybody?

No, sir.

You had not done anything but what you had a right to do?

No, sir.

Why did you leave the county?

Because they would have me up for shooting; everybody else was shooting.

You did not shoot until somebody had shot at you?

No, sir.

You did not shoot at Adam Coleman until he shot at you; you shot at him in self-defense, and left the country?

He shot at me *ust*.

You left the country because Adam Coleman had shot at you first, and left the county because a great many other men had shot at you, and you fired in self defense, and that is the reason you left the county. You staid a pretty good time, didn't you?

I do not know, sir.

You stayed about a year?

No, sir.

How long; lacking about seven days of being twelve months; pretty near a year. You were arrested in New Orleans?

No, sir.

Where?

I was arrested on the I. C. at Rudolph, La.

You went from Miss. to La?

Yes, sir.

You were working a crop up there?

Yes, sir.

You left that crop and went to Louisiana; you left your crop

63 and gave up everything and run away because you had shot at a fellow who tried to kill you; you had shot at him in self defense.

I just had to leave because there was fifteen or twenty shooting.

What became of Wash Latt?

I do not know, sir.

Didn't he go with you to Louisiana?
No, sir.
Didn't he go with you to Hollendale?
Yes, sir.
Don't you know he left Hollendale?
He went with me to Hollendale, and I left him at Hollendale and returned to Merigold.
Who saw you?
Two or three people saw me. Dan Green is one.
He ain't here. Name somebody here that saw you.
None of these saw me.
Did you have Dan Green summoned here?
No, sir.
Who else saw you?
Louis Mundy.
Did you ever summon him here? Did this other man see you—this last man you named?
Yes, sir.
You have not had him summoned here. Now, do you mean to tell the jury you came back to Merigold?
I do.
Did you go to where your crop was?
Yes, sir.
Did you go to Gus Jones' house?
Yes, sir.
You went back to Gus Jones' house a month afterwards.
No, sir; not a month afterwards.
How long afterwards?
Four days.
You came back from Hollendale?
I left Hollendale on Wednesday night.
64 And came back to Marigold; how long did you stay at Marigold?
I staid there two days and nights.
You did not go around on the streets?
I came there and went there, and wanted to stay; I considered I had not done anything.
You wanted to stay but you did not stay——
No; I did not stay.
You left for Louisiana and were brought back from La. under arrest?
Yes, sir.
Defendant rested.

GUS JONES, in rebuttal:

Did you see Charley Smith four or five days after he ran away?
I heard he was there; did not see.

Cross-examined:

Were you not arrested on this same charge?
Yes, sir.

BRADLEY JONES, in rebuttal:

Did Wash Latt to sell you his pistol a short time before this shooting?

Yes, sir; a .38 Forehand and Wordsworth that he tried to sell me.

Cross-examined:

Might it not be a fact that Wash Latt could have *have* had two pistols?

Yes, sir; I saw a .38.

BEN JOHNSON, rebuttal:

Saw Wash Latt's pistol that night.

What size was it?

.38.

Are you sure of that?

Yes, sir; I had it in my hands that night before the shooting.

65 CHARLEY SMITH, recalled by the State:

When Wash Latt shot at you, you told him who you were, and you all immediately left and went over to Gus Jones', didn't you?

No, sir.

What did you do when he shot at you, and you told him who you were; this man shot at you as you were falling off of the fence on the ground, and you told him who you were; what did you all do?

Went down the road.

"The court granted the first, second, third, and fourth instructions for the State, to which the defendant then and there excepted. Clerk copy State's instructions 1, 2, 3, and 4."

Which are in words and figures as follows, to wit:

1st. The court instructs the jury that murder is the killing of a human being with malice aforethought.

Given.

J. E. OUSLEY, *Clk.*
JOHN L. GILL, *D. C.*

2ond. The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that Charley Smith and Wash Latt and Adam Coleman and others engaged in a difficulty in which pistols were used, and that after said difficulty had ceased Charley Smith shot into the house deliberately and intentionally either to kill John McGuirk or Jack Shannon or anyone else in said house, and did this not in necessary self-defense but with malice aforethought, then he is guilty of murder, if by said shooting he killed Wiley Nesbit, even though he did not
66 shoot at Wiley, but shot at some else, and even though he did not know that Wiley was in the house, and did not know that such shot would kill Wiley, for a man who shoots without any legal defense to kill one man and kills another is as guilty as if he had killed the man he intended to kill.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

3rd. The court instructs the jury that if they found the defendant guilty as charged, the effect of that verdict will be that the defendant will be hung, but if the jury believe from the evidence, beyond a reasonable doubt, that the defendant is guilty as charged, they may find the defendant guilty as charged, and fix his punishment at imprisonment for life in the penitentiary; but if the jury agree that the defendant is guilty as charged, but disagree as to the penalty, the jury must find the defendant guilty as charged.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

4th. The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant shot into the house in which Wiley and others were, and did this not in necessary self-defense, and by such shooting killed Wiley Nesby, and that such killing was done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular person, he is guilty of murder.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

67 Whereupon the court gave the following instructions for the defendant, in words and figures as follows, to wit:

The court instructs the jury that, in considering the evidence in this case all the testimony of each witness, and his manner of testifying, and if from such consideration of the evidence and the conduct and manner of the witnesses, respectively, there arises on your minds a single reasonable doubt as to whether Wash Latt shot the last two shots or the accused, the defendant is under the law entitled to the benefit of such a doubt, and you must acquit.

Given.

J. E. OUSLEY, *Clk.*
JOHN L. GILL, *D. C.*

The court instructs the jury that before you can convict the defendant for murder in this case you must be satisfied beyond every reasonable doubt arising out of the evidence that the did wilfully, intentionally, shot and killed him, Wiley Nesbit, or killing him, intending to kill some other person, and if, from all the evidence in the case, a single reasonable doubt arise on your mind as to the fact that defendant got over the fence in front of the house and shot the two last shots in the front door of the house and that one of them killed deceased, you must acquit.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

The court instructs the jury that under the law you are to presume the defendant innocent until he is proven guilty, and the proof to
68 establish his guilt to the extent of justifying you in bringing a verdict of guilty, as charged, must be such that from all the evi-

dence in the case you are convinced beyond a single reasonable doubt arising out of the evidence that defendant did make the fatal shot from which deceased died; if from all the evidence, as aforesaid, there arises on your minds a reasonable doubt as to whether the fatal was fired by defendant or some one else, a doubt on your minds as to that fact, reasonably intended from all the evidence, justifies you, and under the law you are bound to acquit the defendant.

Afterwards, to wit, December 3rd, 1894, as appears on Minute Book "I," page 506, the following verdict of the jury and sentence of the court in words and figures as follows, to wit:

STATE)
2810. Murder.
CHARLEY SMITH.)

This day came the district attorney, who prosecutes for and on behalf of the State, and the defendant, Charley Smith, in his own proper person, and by counsel, and both parties having on Saturday, December 1st, 1894, announced themselves ready for trial, thereupon having come a jury of good and lawful men, selected from the regular venire ordered drawn and summoned herein, on Saturday, December 1st, 1894, aforesaid, to wit, the regular jury for the week, and talesmen, to wit, U. P. Norrell and eleven others, empannelled and sworn to well and truly try the issue joined between the State of Mississippi and the defendant, and a true verdict give according to the evidence and the law, who
69 having heard the arguments and received the instructions of the court, retired in charge of their sworn bailiffs to consider of their verdict, and having considered of the same, returned into open court, in the presence of the prisoner, the following verdict, to wit: "We, the jury, find the defendant guilty of murder."

The defendant being brought to the bar of the court, and by the court asked if he had anything to say why the sentence of the law should not be pronounced upon him, and answering says he had naught to say, thereupon the court proceeded to pronounce sentence upon him; that for the crime of murder said defendant, Charley Smith, be hung by the neck until dead, on Monday, January 14th, 1895, between the hours of 8 o'clock a. m. and 4 o'clock p. m., by the sheriff of Bolivar County, at the jail, or within a inclosed yard of said jail, unless the board of supervisors of the county in which the prisoner is confined, for good cause, shall designate some other place, and notify the sheriff of such order, who shall then execute the sentence at the place designated by the board, and, unless the sentence be suspended, the clerk of the court shall deliver to the sheriff of the county a copy of such sentence, under the seal of the court, which shall be his warrant for executing the prisoner.

On the fifth day of the criminal term of said circuit court, the court ordered the minutes to be enlarged by an order nunc pro tunc, as of the first day of the criminal term of the court. These corrections were made in accordance with the facts and only put in the minutes what should have been there at first, as were waived by defendant's motion to quash the venire for the second week, and such objections as were raised
70 by defendant's motion to quash the pannel. Said corrections of the minutes were made by the aid and assistance of the district

3rd. The court instructs the jury that if they found the defendant guilty as charged, the effect of that verdict will be that the defendant will be hung, but if the jury believe from the evidence, beyond a reasonable doubt, that the defendant is guilty as charged, they may find the defendant guilty as charged, and fix his punishment at imprisonment for life in the penitentiary; but if the jury agree that the defendant is guilty as charged, but disagree as to the penalty, the jury must find the defendant guilty as charged.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

4th. The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant shot into the house in which Wiley and others were, and did this not in necessary self-defense, and by such shooting killed Wiley Nesby, and that such killing was done in the commission of an act eminently dangerous to others, and evincing a depraved heart, regardless of human life, although without any premeditated design to effect the death of any particular person, he is guilty of murder.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

67 Whereupon the court gave the following instructions for the defendant, in words and figures as follows, to wit:

The court instructs the jury that, in considering the evidence in this case all the testimony of each witness, and his manner of testifying, and if from such consideration of the evidence and the conduct and manner of the witnesses, respectively, there arises on your minds a single reasonable doubt as to whether Wash Latt shot the last two shots or the accused, the defendant is under the law entitled to the benefit of such a doubt, and you must acquit.

Given.

J. E. OUSLEY, *Clk.*
JOHN L. GILL, *D. C.*

The court instructs the jury that before you can convict the defendant for murder in this case you must be satisfied beyond every reasonable doubt arising out of the evidence that the did wilfully, intentionally, shot and killed him, Wiley Nesbit, or killing him, intending to kill some other person, and if, from all the evidence in the case, a single reasonable doubt arise on your mind as to the fact that defendant got over the fence in front of the house and shot the two last shots in the front door of the house and that one of them killed deceased, you must acquit.

Given.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

The court instructs the jury that under the law you are to presume the defendant innocent until he is proven guilty, and the proof to
68 establish his guilt to the extent of justifying you in bringing a verdict of guilty, as charged, must be such that from all the evi-

dence in the case you are convinced beyond a single reasonable doubt arising out of the evidence that defendant did make the fatal shot from which deceased died; if from all the evidence, as aforesaid, there arises on your minds a reasonable doubt as to whether the fatal was fired by defendant or some one else, a doubt on your minds as to that fact, reasonably intended from all the evidence, justifies you, and under the law you are bound to acquit the defendant.

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STATE)
) 2810. Murder.
CHARLEY SMITH.)

This day came the district attorney, who prosecutes for and on behalf of the State, and the defendant, Charley Smith, in his own proper person, and by counsel, and both parties having on Saturday, December 1st, 1894, announced themselves ready for trial, thereupon having come a jury of good and lawful men, selected from the regular venire ordered drawn and summoned herein, on Saturday, December 1st, 1894, aforesaid, to wit, the regular jury for the week, and talesmen, to wit, U. P. Norrell and eleven others, empannelled and sworn to well and truly try the issue joined between the State of Mississippi and the defendant, and a true verdict give according to the evidence and the law, who
69 having heard the arguments and received the instructions of the court, retired in charge of their sworn bailiffs to consider of their verdict, and having considered of the same, returned into open court, in the presence of the prisoner, the following verdict, to wit: "We, the jury, find the defendant guilty of murder."

The defendant being brought to the bar of the court, and by the court asked if he had anything to say why the sentence of the law should not be pronounced upon him, and answering says he had naught to say, thereupon the court proceeded to pronounce sentence upon him; that for the crime of murder said defendant, Charley Smith, be hung by the neck until dead, on Monday, January 14th, 1895, between the hours of 8 o'clock a. m. and 4 o'clock p. m., by the sheriff of Bolivar County, at the jail, or within a inclosed yard of said jail, unless the board of supervisors of the county in which the prisoner is confined, for good cause, shall designate some other place, and notify the sheriff of such order, who shall then execute the sentence at the place designated by the board, and, unless the sentence be suspended, the clerk of the court shall deliver to the sheriff of the county a copy of such sentence, under the seal of the court, which shall be his warrant for executing the prisoner.

On the fifth day of the criminal term of said circuit court, the court ordered the minutes to be enlarged by an order nunc pro tunc, as of the first day of the criminal term of the court. These corrections were made in accordance with the facts and only put in the minutes what should have been there at first, as were waived by defendant's motion to quash the venire for the second week, and such objections as were raised
70 by defendant's motion to quash the pannel. Said corrections of the minutes were made by the aid and assistance of the district

attorney, said corrections being after the said several motions had been overruled on the 3rd day of said term of the criminal court to which the defendant excepted.

Whereupon the minutes were corrected, as appears in Minute Book "I," page 523, as follows, to wit:

The following jurors were duly and legally and at the time required by law, and drawn in vacation by the sheriff, clerk of the circuit court, and clerk of the chancery court, to serve as jurors for the third week of the term beginning on Monday, December 3rd, 1894, and the list thereof were duly made and certified, as follows, to wit:

In circuit court, Bolivar County, November term, A. D. 1894. List of names drawn by circuit clerk, sheriff, and chancery clerk, by direction of the Honorable R. W. Williamson, presiding judge of the fourth judicial district of the State of Mississippi, for the November term of our said circuit court of Bolivar County, beginning on the first Monday of December, A. D. 1894, for the week of said term beginning on the 3rd day December, A. D. 1894.

List of jurors.

	J. W. Thomas	2	F. B. Keller	2
	James Bradshaw	2	J. J. Ferguson	2
	G. L. Wrenn	2	L. Ballow	4
	R. H. Montgomery	3	J. C. West	1
	D. Wilson	3	C. W. Flowers	3
	John B. Walton	3	N. F. Gloze	3
71	John T. Kuhn	3	R. D. Miller	5
	S. W. Roark	3	Frank Wright	2
	W. R. Woolfolk	3	W. L. Key	5
	J. A. Cayo	5	R. T. Torrian	3
	W. D. Arnold	3	J. A. Chamberlain	2
	J. E. Edmonds	4	W. R. Sheppard	1
	E. D. Dewberry	1	Price Blanchard	2
	G. W. Smith	4	W. W. Johnson	3
	W. D. Patrick	3	John Dixon	3

THE STATE OF MISSISSIPPI,
County of Bolivar:

We, J. E. Ousley, clerk of the circuit court of Bolivar County, George P. Melchior, sheriff of Bolivar County, and T. R. McGuire, chancery clerk of Bolivar County, do hereby certify that by direction of the Honorable R. W. Williamson, presiding judge of the fourth judicial district, we, on the 5th day of November, A. D. 1894, being the day set by law, in the circuit clerk's office of said county, drew from the box known and kept as "jury box," the names above written, to serve as jurors at the next term of our circuit court, to be holden at Rosedale, in said county, beginning on the first Monday of December, A. D. 1894, and that said list of jurors were drawn for the week beginning on Monday, the 3rd day of December, A. D. 1894.

Given under our hands this the 5th day of November, A. D. 1894.

[SEAL.]

J. E. OUSLEY, *Circuit Clerk.*
G. P. MELCHIOR, *Sheriff.*
T. R. MCGUIRE, *Chancery Clerk.*

72 The clerk thereupon issued the venire for the third week of the November term, beginning on Monday, December 3rd, 1894, and delivered the same to the sheriff, returnable on the proper day; the sheriff thereupon, upon the first day of the present term, to wit, the criminal term, the same being the third week of the November term of the court, returned into court the following-named persons summoned said venire to serve as jurors as aforesaid for the third week, to wit:

In pursuance of the mandate of the within writ I have executed the same by summoning, as directed in the said writ, the following-named persons, to wit: R. H. Montgomery, D. Wilson, J. B. Walton, John R. Kuhn, S. W. Roark, W. R. Woolfolk, C. W. Flowers, N. F. Gloze, R. T. Torrian, W. W. Johnson, John Dixon, I. W. Thomas, F. B. Keeler, G. L. Wrenn, J. J. Fergurson, Frank Wright, J. A. Camberlain, Price Blanchard, E. D. Dewberry, W. R. Sheppard, J. A. Cayo, R. D. Miller, J. E. Edmonds, W. L. Key, G. W. Smith, Lawrence Ballow, and W. D. Arnold. "Not found:" W. D. Patrick, Henry Bradshaw, J. C. West.

This 3rd day of Dec., 1894.

G. P. MELCHIOR, *Sheriff.*

And of the above the following of those who were drawn as aforesaid and summoned, and of talesmen summoned by the sheriff, by order of the court, who were sworn and empannelled according to law, to serve as jurors of the third week of this term, the same being the third week of the term, as follows, to wit: J. W. Thomas, R. H. Montgomery, D. Wilson, S. W. Roark, W. R. Woolfolk, J. A. Cayo, J. J. Ferguson, L. Ballow, C. W. Flowers, N. F. Gloze, R. D. Miller, Frank A. Wright,

73 R. T. Torrian, J. A. Chamberlain, W. R. Sheppard, W. W. Johnson, John Dixon, T. J. Orr, W. F. Halliday, O. G. Rivers, A. R. Shattuck, E. Montgomery, C. S. Labdell, and Bendy Miller. And this order should have been entered as of the first day of the week, December 3rd, 1894, and is now entered "nunc pro tunc."

On the 6th day of December, 1894, being a day of the said criminal term of said court, the defendant having informed the court on the day of his conviction, before sentence was pronounced on him by the court, that he wished to be allowed to prepare a motion in arrest of judgment, the court held that the motion in arrest of judgment and the motion for a new trial could be made in one motion, but on said 5th day aforesaid the court ordered counsel to present both motions in one; that it would fine defendant counsel for contempt unless he combined the motion in arrest of judgment and the motion for a new trial, that both might be heard as one motion, to which action the defendant then and there excepted.

On the 6th day of December of said criminal term defendant moved the court for a new trial, said motion being in words and figures as follows, to wit:

STATE
vs. } 2810. Murder.
CHARLEY SMITH.

Now comes the defendant in this cause and moves the court that the judgment rendered against him in this cause by the court on the 3rd of

December, 1894, and the virdict of the jury in said case be set aside and he be granted a new trial:

1st. Because the virdict is contrary to the law and the evidence, and the judgment not sufficient in law.

74 2nd. The court erred in overruling the defendant's motion to quash the indictment at the May term, 1894, as of record.

3d. The court erred in overruling defendant's application for removal of the trial on the said indictment to the United States circuit court for the western division of the southern district of Mississippi.

4th. The court erred in overruling defendant's application for a postponement of the trial of his case to a future day of the term.

5th. The court erred in overruling defendant's motion to quash the weekly venire.

6th. The court erred in overruling defendant's motion to quash the panel.

7th. The court erred in granting the 1, 2, 3, 4 instructions for the State.

8th. The court erred in overruling the objections of defendant to the registration qualifications of the jurors, respectively, as they were tendered him on their voi' dire, because said registration of the county at which they registered was ordered by the board of supervisors of the county without the existence of the necessity or conditions required by the statute that said board should have such authority. Said copy of order of said board here made a part of this motion as exhibit:

"Ordered by the board that the circuit clerk be, and is hereby, ordered to make a new and complete registration of the voters of the county, and said clerk to publish notice of the times and places of said registration."

9th. The court erred, on the 4th day of December, 1894, and the (5th) fifth day of the criminal term, in correcting the minutes of the first day of the term of the November term, current, said correction being a

75 full and complete supply of every objection made by the defendant in his motion on the 1st day of Dec., 1894, and the 3rd day of the criminal term; said motion being to quash the weekly venire, and said other motion being to quash the panel, and the court having overruled said several motions on the said 3rd day the criminal term, and said correction of the minutes of the first day of said term as herein complained of was entered nunc pro tunc on the 5th day of criminal term, after motions overruled. (Order on Minute Book I, page 513.)

10th. The defendant was not tried by a jury fair' and impartially selected according to the laws of Mississippi and the Constitution of the United States.

11th. Because the defendant was not convicted by due process of law and was denied equal protection under the laws of said State on account of his race.

12th. The record of the whole proceedings in this case is not sufficient in law to uphold the judgment of the court; the sentence is not as shown by the record sufficient to uphold the writ of execution.

CHARLES SMITH.

(Endorsed:) 2810. State vs. Charley Smith. Murder. Filed Dec. 6th, 1894. J. E. Ousley, clk. John L. Gill, D. C.

The court overruled the said motion, to which ruling the defendant then and there excepted.

Motion for a new trial overruled on Minute Book I, page 528, December 6th, 1894, in words and figures as follows, to wit:

76 STATE
vs. } 2810. Murder.
CHARLEY SMITH.

This cause coming on this day to be heard on the motion for a new trial herein, and the court being satisfied that said motion is not well taken, it is therefore ordered and adjudged that said motion be, and the same is hereby, overruled, the defendant being in open court. Ordered, this the 6th day of December, 1894.

On the 6th day of December, 1894, of said criminal term, the defendant filed his petition for an appeal to the supreme court, which are in words and figures as follows, to wit:

THE STATE
vs. } 2810.
CHARLEY SMITH.

To J. E. OUSLEY,
Clerk of the Circuit Court of Bolivar County, Mississippi:

Whereas, as on the 3rd day of December, 1894, Charley Smith, a citizen of said State, was convicted of murder and sentenced to the penalty of death, and was so sentenced on said day, and said Charley Smith, feeling himself aggrieved thereby, and doth therefore pray an appeal to the next term of the supreme court of the State of Mississippi, and therefore tender this his application for said appeal to the term aforesaid of the said supreme court.

CHARLEY SMITH.
C. J. JONES, *Atty. for Deft.*

77 (Endorsed:) 2810. State vs. Charley Smith. Application for appeal. Filed Dec. 6th, 1894. J. E. Ousley, clerk. John L. Gill, D. C.

On the 6th day of Dec., 1894, of said criminal term the defendant personally appeared before John L. Gill, deputy circuit clerk of said county, and made affidavit of his poverty and took the pauper oath according to law.

Whereupon the following affidavit was made, in words and figures as follows, to wit:

THE STATE OF MISSISSIPPI,
Bolivar County:

I, Charley Smith, am a citizen of the State of Mississippi, and by virtue of my poverty am not able to pay or give security for the cost of

the appeal to the supreme court of the State, of said State of Mississippi, and that I verily believe that I have a just cause for taking said appeal.

CHARLES SMITH.

Sworn to and subscribed this the 4th day of Dec., 1894.

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *Clerk.*

(Endorsed:) 2810. State vs. Charley Smith. Pauper's oath. Filed Dec. 6th, 1894. J. E. Ousley, clerk. John L. Gill, D. C.

78 On the 6th day of Dec., 1894, of the said term the defendant made application to the court for sixty days in which to prepare his bill of exceptions, which application the court granted, and defendant tenders this his bill of exceptions and asks that the same be signed and made a part of the record in the case, which is accordingly done.

Signed this 14th day of January, A. D. 1895.

R. W. WILLIAMSON, *Judge.*

STATE OF MISSISSIPPI,
Bolivar County:

I, J. E. Ousley, clerk of the circuit court in and for said county, do hereby certify that the foregoing 100 pages contain a full and complete copy of all the orders, motions, and a special bill of exceptions on page' 15 & 16, the order of organization of court trial term, testimony of all witnesses as set forth in the bill of exceptions, and, by order of the court, a full, true, and correct of the stenographer's notes of the cross-interrogatories propounded to the defendant, Charley Smith, as appears on page' 70 to 82, inclusive, and that I have not omitted any part, except where a copy of some order had been made previously in this transcript. I have fully endeavored to place each and every as same occurred chronologically during this trial.

In witness I have hereunto set my hand and official seal this the 25th day of February, 1895.

[SEAL.]

J. E. OUSLEY, *Clerk.*
JOHN L. GILL, *D. C.*

79 The foregoing record endorsed as follows:

"Filed March 2nd, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C."

And on March 4th, 1895, there was filed an assignment of errors in words and figures as follows, to wit:

CHARLEY SMITH vs. THE STATE. } Murder. The State of Mississippi in the Supreme Court, March term, 1895.

Assignment of error.

Now comes appellant in this cause and submits the following assignment of errors.

(1) The court erred in overruling defendant's motion to quash the indictment.

(2) The court erred in overruling defendant's application for the removal of the trial of the indictment against him to the United States circuit court for the western division for the southern district of Mississippi.

(3) The court erred in overruling defendant's application for postponement of his trial to a further day of the term.

(4) The court erred in overruling defendant's motion to quash the weekly venire of jurors.

80 (5) The court erred in overruling defendant's motion to quash the panel.

(6) The court erred in granting the 1, 2, 3, and 4 instructions, respectively, for the State.

(7) The court erred in overruling defendant's objection to the registration qualification of the jurors, respectively, as they were tendered—on their voi' dire—because the record of said county board of supervisors fail' to show the statutory necessity for ordering said new registration.

(8) The court erred on the fifth day of the criminal term, being the Nov. term, 1894, in entering an order nunc pro tunc, changing the minutes of the first day of the term, so as to cure the objections raised by defendant in his motion to quash the venire facias for the 2ond week and the motion made by defendant to quash the panel.

(9) The court erred in denying defendant equal protection under *under* the laws of the State of Mississippi.

(10) The court erred in refusing to set aside the verdict of the jury, which was contrary to the evidence.

(11) The court erred in sentencing the defendant to be hung upon the verdict of the jury, when the jury was never sworn to try the issue joined between the State of Mississippi and the defendant, Charley Smith, but they were sworn to try the issue joined between the State of Mississippi and the defendant.

(12) The court erred in overruling the defendant's motion for a new trial upon the grounds therein set out.

Submitted.

C. J. JONES,
Attorney for Defendant.

81 (Endorsed:) "Assignment of errors. Filed March 4, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C."

And on the 18th day of March, 1895, the following order of submission was made by the supreme court of Mississippi, to wit:

CHARLEY SMITH
v. } 8050.
STATE OF MISSISSIPPI.

Submitted on briefs by Mr. C. J. Jones, for appellant, with leave to the attorney-general to file brief during the week.

And on the 3rd day of June, 1895, said supreme court filed an opinion in said cause in words and figures following, to wit:

82 CHARLEY SMITH
vs.
THE STATE.

WOODS, J., delivered the opinion of the court.

The action of the court below in overruling the application for removal was not error. See John Gibson vs. State, decided at the present term of this court.

The motion to quash the indictment was properly denied. There was either no evidence offered in support of the motion, or if offered, it does not appear in the record, and in this case we can do nothing but affirm the action of the court in denying this motion.

The affidavit appended to the motion in its terms affords no sort of evidence (even if it had been agreed to be considered as such, as was the case in Neal vs. Delaware, 103 U. S., 370) that the affiant had any personal knowledge touching any of the facts relied upon as grounds for upholding the motion. It was made "as to the best of affiant's knowledge and belief," and yet the affiant may have no personal knowledge whatever as to any of the material facts. The affidavit was not evidence to support the motion. In Neal vs. Delaware, supra, the verified petition for removal was treated by the court as evidence for the motions to quash, because of the agreement of the attorney-general of Delaware with the prisoner's counsel to that effect, as the same was construed by the majority of the court.

We find no reversible error in any of the other rulings complained of.

Affirmed.

83 And on the 3rd day of June, 1895, a final judgment was rendered by said supreme court in words and figures following, to wit:

CHARLEY SMITH
vs.
STATE OF MISSISSIPPI. No. 8050.

This cause having been submitted on a former day of this term on the record herein from the circuit court of Bolivar County, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order and adjudge that the judgment of said circuit court rendered in this cause at the November term thereof, A. D. 1894, on the 3rd day of December, 1894, be, and the same is hereby, affirmed. And it is further ordered and adjudged by this court that the appellant, the said Charley Smith, for such his crime of murder, be kept in close confinement in the jail of said county until Wednesday, the 10th day of July, 1895, on which day, between the hours of 10 o'clock a. m. and 4 o'clock p. m., he, the said Charley Smith, shall be, by the sheriff of said county, within the inclosure of said jail, or at such other place of execution as the board of supervisors of said county may designate, according to law, hanged by the neck until he be dead.

84 *Petition for writ of error.*

In the supreme court of the State of Mississippi. Ex parte Charley Smith. Application for writ of error.

To the Honorable TIM E. COOPER,
Chief Justice of the Supreme Court of the State of Mississippi:

This petition of Charley Smith and his attorney, Cornelius J. Jones, respectfully represents to this honorable court that at the regular May term of the circuit court of Bolivar County, Mississippi, 1894, Charley Smith, the petitioner herein, was presented by indictment from the grand jury of said county on the first day of the criminal term of said May term, 1894, of said county. The accused was arraigned upon the said indictment and then and there made a motion to quash the said indictment, alleging as grounds therefor that the grand jury which presented the said indictment was not a regularly selected, summoned, and sworn grand jury; that the said grand jury was not selected and summoned according to the laws of the said State. Among other grounds alleged in said motion the accused specifically charged that the officers of the county, charged under the laws of said State with the duty of listing, selecting, and summoning said jurors for the said May term of said State circuit court, wilfully and purposely selected all white men on the account of their color, to the exclusion of all colored persons of the said county on the account of their color; that said officers of the county, charged under the laws of said State with the selection of the jurors for
85 said May term of said circuit court, with great prejudice to the accused on the account of his color, irrespective of the fact that more colored men were legally qualified for jury service in said county than there were white men, owing to the great race prejudice prevailing in said county against the accused and his race on the account thereof, for the purpose of procuring an indictment against the accused on the account of his race and color, excluded from the jury list the names of all colored qualified jurors of said county on the account of their race and color, and therefore insisted upon his right to the equal protection of the laws of the State of Mississippi, and asserted his immunity from any deprivation of his liberty or jeopardy of his life in said State except by due course of law. The accused further prayed the process of the court for the said officers of the county, that they might be examined under oath touching the charges made in said motion.

The trial court overruled the said motion to quash the indictment, which motion being duly filed and heard by the said trial court and overruled, the defendant then and there excepted; after which ruling and noting of the exception, the said circuit court, on application of the State, continued the said cause until the November term of said circuit court, 1894.

On the first day of the criminal term of said regular November term, 1894, the accused was called upon to announce if he was ready for trial, whereupon the relator herein filed and submitted for the consideration of the court a petition for the removal of the trial of the indictment against
him from the said State circuit court to the United States circuit
86 court for the western division of the southern district of Mississippi, and alleged as grounds therefor that the grand jury which

presented the indictment against him at the May term of said circuit court, was not a legally selected, summoned, and organized body according to the laws of said State; that the list of jurors selected by the officers of the county charged under the State law with the duty of selecting said jurors for said May term of said circuit court did not certify to the regularity of their proceedings in that behalf, as the State law directs that they should; further, your petitioner alleged, in the said petition for said removal of his trial of the said indictment, that he was a negro, color black, and that by reason of his color and race the officers of the law charged by the laws of said State with the duty of selecting, summoning, and returning said jury list for said May term of said court selected the entire list of jurors for said May term of said court white men, who were selected by said officers purposely on the account of their color, for the purpose of procuring an indictment against the relator, because of the prejudice had against him by the white race in said county on the account of his color and race, and that at the time said officers of the said Bolivar County, who under the laws of said State are charged with the selection, listing, summoning, and returning said jurors for said term of said court, there were of colored men in the county aforesaid, duly and legally qualified for jury service, twice the number to that of white men, and that said officers purposely and intentionally excluded from said jury list,

in the making up thereof for the said May term, 1894, for said
87 county, the names of all colored men of the county, though otherwise qualified, on the account of their race and color, for the 'pose of depriving the accused of that equal representation and protection of the laws of the said State by said officers thereof to which he was by the Constitution and laws of the United States justly entitled.

Your petitioner also asked that said officers be subpœnaed before the trial court, that the charges therein alleged against them might be by the court inquired into.

Relator further states that the said petition was duly accompanied with the affidavit of the accused upon knowledge and belief, and also was the motion to quash the indictment duly accompanied with the affidavit of the accused upon knowledge and belief. The said State court denied the petition without giving any reasons therefor, and then and there the defendant reserved an exception to the ruling of the court, and then *then* and there made a motion to quash the weekly venire, alleging substantially the same grounds as embodied in the motion to quash the indictment and petition for the removal to the Federal court, which motion was overruled and exception reserved. Then and there the accused moved the court to quash the panel as tendered him by the State, whereupon the court overruled the same. Said motion to quash the panel was based upon the same grounds as those alleged in the exception to the weekly venire, to which ruling of the court the defendant reserved an exception. The trial was proceeded with, and, on the fifth day the

said criminal term, the accused was returned by the petit jury
88 guilty as charged, which charge was that of murder. The defendant immediately moved the court for a new trial, and in said motion addressed the attention of the trial court to the error noted by him to said court's ruling in overruling his motion to quash the indictment at the May term, 1894, and the error in denying his petition for

removal to the Federal court, and his motion to quash the weekly venire, and the error in overruling his motion to quash the panel; which motion for a new trial was duly overruled by the court and exception reserved. The defendant offered to move the court in arrest of judgment, but the trial court declined to entertain said motion, and threatened to fine defendant's attorney for contempt if the said motion for a new trial and arrest of judgment were not combined, to which ruling exception was duly reserved. Thereupon the court proceeded to pronounce the death penalty, and fixed the 11th day of January, 1895, as the day of execution. The defendant then and there prayed an appeal to the supreme court of the State of Msssissippi, being the highest court of appeal in the State, which appeal was duly granted.

In due course of proceedings, the defendant tendered to the trial judge his bill of exceptions, embracing the exceptions to his rulings on overruling the motion to quash the indictment.

The order excepted to overruling and denying his petition for the removal of his trial to the Federal district court for the western southern division of Mississippi, and the motion to quash the weekly venire, and motion to quash the panel, which was by said judge duly signed and sealed according to law; and in due course of time the whole record of proceedings, including the motion to quash the indictment, the
89 petition for removal of the trial to the district Federal court aforesaid, *to* motion to quash the weekly venire and the panel of jurors, and the orders overruling the respective applications, and the exceptions reserved were all duly certified to the March term, 1895, of the State supreme court, by the clerk of the circuit court of said Bolivar County, Mississippi.

And that appellate court in its appellate jurisdiction has deliberately reviewed the entire record certified to it in this matter, and has decided the same questions presented to and passed upon by the trial State court, and on the 3rd day of June, 1895, rendered a judgment affirming the judgment of the trial court, and fixed the 10th day of July, 1895, as the day of execution.

Now relator charges that he has in this proceeding been deprived of the equal protection of the laws of the State of Mississippi by the officers of said State, by their wilful violation of the laws of said State to his prejudice intentionally and purposely done because of his race and color, and that he is now deprived of his liberty, and it is proposed by the said officers of said State to deprive him of his life, when at the same time he has not been tried and convicted and sentenced according to the laws of said State, and not with due course of law.

Wherefore your petitioner prays that he may be granted by this, the supreme court of the State of Mississippi, an appeal to the Supreme Court of the United States, with stay of execution pending said appeal, and the said appeal be duly certified according to law.

Your petitioner, in duty bound, doth forever pray, &c.

CHARLES SMITH,
90 By CORNELIUS J. JONES,
His Attorney.

GREENVILLE, MISS., *June 14th, 1895.*

THE STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, I. H. Robb, a notary public duly authorized by law to administer oaths, Cornelius J. Jones, attorney for Charley Smith, who, by me being duly sworn, deposes and says that the facts set out in the foregoing petition are true and correct, as therein stated upon information obtained from the record of the proceedings as he recollects them to be with regard to the allegations and filing of the several motions to quash therein mentioned, and the petition for removal of the trial of the said indictment to the United States circuit court for the western southern division of the State of Mississippi, and the other facts upon information obtained from relator Charley Smith, and that he verily believes the said information is true and reliable.

CORNELIUS J. JONES.

Sworn to and subscribed to before me, J. H. Robb, this 15th day of June, 1895.

[SEAL.] I. H. ROBB, *Notary Public.*

91 STATE OF MISSISSIPPI:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition it is ordered that a writ of error be allowed to said court and that the same be made a supersedeas.

In testimony whereof witness my hand this the 27th day of June, A. D. 1895.

TIM E. COOPER,
Chief Justice of Mississippi.

(Endorsed:) "Filed June 27, 1895. Oliver Clifton, clerk."

92 The United States of America to the clerk of the supreme court of the State of Mississippi:

Because manifest error hath intervened in the record, process, proceedings, judgment, and sentence of your said court in the cause therein lately pending wherein Charles Smith was appellant on appeal from the circuit court of Bolivar County, in said State, to your said supreme court, wherein on the third day of June, 1895, the judgment and sentence of said circuit court of Bolivar County, rendered in said cause, was by said supreme court of the State of Mississippi affirmed and said appellant sentenced to be hanged, and fixed the 10th day of July, 1895, as the day of execution of said appellant.

You are, therefore, hereby commanded to send certified, under your hand and the seal of your said supreme court, a full, true, and perfect transcript of all of said record, process, proceedings, judgments, and sentence of said supreme court in said cause, so that the same be in and before our Supreme Court of the United States at Washington on or before the 27th day of August, 1895, in order that our said Supreme Court may cause to be done for the correction of the errors therein what of right and justice and according to the law of the land ought to be done.

And that in the meantime, until the further order of this the Supreme Court of the United States in said cause, the execution of the said sentence be, and the same is hereby, stayed and suspended.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of our said circuit court this 29th day of June, A. D. 1895.

[SEAL.] L. B. MOSELEY, *Clerk.*

93 (Indorsed:) 8050. 1st dist. Charley Smith v. State of Mississippi. Writ of error & supersedeas. Filed June 27, 1895. Oliver Clifton, clerk.

94 *Petition for writ of error.*

In the United States Supreme Court, Ex parte Charley Smith. Application for writ of error.

To the Honorable M. W. FULLER,
Chief Justice of the Supreme Court of the United States:

And now comes Charley Smith, and by his attorney, Cornelius J. Jones, respectfully representing the following facts in this an application for the writ of error:

On the first day of the criminal term of the circuit court for the May term, 1894, of Bolivar County, State of Mississippi, being a regular term of said court as required by the laws of said State, said Charley Smith was arraigned under an indictment for the criminal offense of murder, which indictment was presented by the grand jury of the said May term, and, before pleading thereto, the said Charley Smith, and by his attorney, made a motion to quash the said indictment, and alleged as grounds therefor that the said grand jury which presented said indictment was an illegal grand jury, in this, that the list of names from which said grand jury was selected was not regularly listed by the board of supervisors for said county of Bolivar as the law directs, as prescribed in said State statute laws, for said term of said court. That the laws requiring the circuit clerk to prepare the jury box of the county with regularly drawn names of persons to serve as jurors for said May term was not regarded and followed by that officer as directed by the State law. That the defendant,

95 Charley Smith, was a negro, color black, and that owing to the great prejudice prevailing against him on account of his color the officers of the said county of Bolivar, viz, the sheriff, the chancery clerk, and circuit clerk, who, under the laws of said State are charged with the duties of listing and preparing a list of names of persons to be summoned to serve as grand jurors for said May term of said court, wilfully and purposely violate the State law in the said selection of names for said grand jurors on the list of names for the first week of the said May term, 1894, from which list of fifty names the court was to select on the first day of the civil term thereof 18 grand jurors, which fifty names for the said first week of said May term were purposely and intentionally selected the names of all white men, who were selected by said officers aforesaid purposely on the account of their color, because of the express prejudice the white race had toward said defendant on the account of his color,

and that said selection of the entire list of jurors for said first week white men for the purpose and the knowledge that the said grand jurors for the said May term would be from said list drawn by the court, wilfully and intentionally for the express purpose of procuring an indictment against said Charley Smith, greatly to his prejudice, wilfully, intentionally, and purposely excluded and rejected the names of all persons qualified jurors of color from said jury list on the account of their color, to the great prejudice of defendant on the account of his color.

Relator stated that there were in the county of Bolivar aforesaid, and duly registered upon the rolls of the county, twice the number of colored
96 qualified jurors to that of the white jurors or persons so qualified of the white race, and that had the law of the State regarding the selection of jurors of the county been adhered to strictly, there would have been some duly qualified persons of the negro race drawn, both in the list of fifty for the first week of said term and upon the grand jury of 18 by the court on the first day of said May term. But that said grand jury was drawn all of white men by the manipulation of the said officers who were all white men and members of the white race (for while the circuit clerk proper is a negro, the officiating in this matter respecting that office was by his deputy, who is a white man); and that the said indictment was not an indictment presented regularly by a regular grand jury of the county; and that he, Charley Smith, was a citizen of the United States, entitled under the Constitution thereof to equal protection under the laws of the State of Mississippi, and secured under the Federal Constitution from any deprivation of his liberty without due process of law, the laws of said State; and that a trial upon the said indictment was, or would be, violative of his aforesaid Federal right, and prayed the same be quashed accordingly, which motion the said trial court did then and there overrule, to which said ruling the defendant then and there excepted, after pleading not guilty. The State secured a continuence of the case until the November term, 1894, of said circuit court, and on day of said November term, when the State pronounced ready for trial, the defendant then and there presented for the consideration of the said court, which was duly filed and sworn to by defendant's deposition and acknowledgment, a petition for the removal of the trial of said indictment from the said
97 Bolivar County circuit court of said State to the United States circuit court for the western division of the southern district of the State of Mississippi. Relator states that there were assigned in said petition for removal aforesaid that the said indictment upon which it was now the purpose of the State to try him present the charge of murder, and that under the said State law, upon the verdict of guilty as charged by a petit jury for such a crime, the penalty of the law was death, and that the said indictment was not a regular indictment presented by a regular and legal grand jury of said county, but that said grand jury was irregularly and illegally selected, summoned, and drawn at the May term of said circuit court, 1894, at which term of said court said indictment was presented by said illegal grand jury. That the officers of the county aforesaid, charged under the law with the duty of selecting, listing, drawing, and summoning said list of jurors for the first week of the said May term, 1894, wilfully, intentionally, and purposely ignored and violated the provision of the State law relative to the said listing, selecting and

drawing said list of jurors for the first week of said May term, 1894, from which list of fifty selected names 18 were to have been drawn on the first day of said first week for grand jurors for said May term, in this, that the said officers intentionally, wilfully, and purposely selected the said list of jurors for the said first week, of which number 18 were taken or drawn by the court on the first day of the term aforesaid as said grand jurors, all which names of persons of the white race. Relator stated
98 in said petition that the defendant, Charley Smith, was a negro, color black, and a member of the black or negro race, and that there existed against him in said county and State great race prejudice on account of his color, and that the grand jurors and the list from which said jury was drawn were by the said county officers selected all white men, which selection of said list for said first week names of all white men, as aforesaid, resulting in the said drawing of the 18, as aforesaid, by the court was purposely done, in disregard of the State law, and intentionally, on account of the race and color of the said list of jurors for the first week of said May term, for the purpose of procuring an indictment against the said defendant on account of the great prejudice existing against said defendant on account of his race and color; and that of the names of many hundreds of qualified jurors of the colored race, duly registered and qualified under the laws of the said State, a number of whom would have been drawn by said officers had they conformed to the law, were wilfully, intentionally, and purposely, by said officers so charged with said listing, drawing, and selecting said jury list, excluded by said officers and illegally rejected, as aforesaid, by the authorities aforesaid of said county, on the express account of their color, to the prejudice of defendant, Charley Smith, which prejudice against defendant aforesaid, by the officers aforesaid and the white race aforesaid, in the county aforesaid, was expressly on account of his race and color. Relator states that the said petition for removal aforesaid was duly sworn to by defendant, and process for the officers aforesaid was earnestly prayed, that the allegations
99 aforesaid could be more fully shown to the court. The court, without granting process for said officers as prayed for, and without any denial on part of the said officers, all whom were in the court room except the chancery clerk, who was in another office in the same building—overruled the said petition, to which ruling the defendant then and there excepted. Relator states that the petition alleged that his rights to equal protection of the State laws, as guaranteed under the Federal Constitution, was sought to be, and if forced to a trial under said indictment would be, denied him by the authorized courts of the State aforesaid, and that to be tried and convicted he would, under said State law, be hanged as the lawful penalty for said crime, which would, under the circumstances, be depriving of life or liberty without due course of said State law and in violation of the express right reserved to him under the Federal Constitution. Relator states that he duly swore to his motion at the May term, 1894, to quash the indictment, said oath being on knowledge and belief. Relator further states that on the third day of the criminal branch of the said November term of said Bolivar County circuit court, 1894, he was put upon his trial for life in said court, and on the fifth day of said criminal term the petit jury returned a verdict of guilty, as charged. The defendant then moved the court for a new trial

and assigned as error the rulings of the court in overruling the said motion to quash the indictment at the May term, 1894, and the ruling of the court in denying the petition for removal to the circuit court of the United States for the western division of the southern district of Mississippi. Relator states that he offered to move the court in arrest of
100 judgment, which the court refused to hear or permit defendant's attorney to read. There were other assignments of error to the many rulings of the court in said motion for a new trial, but the motion to quash the indictment and the petition for removal were prominently and decisively presented and an unmistakable notice given by the court, which motion for new trial was overruled and exception reserved.

Thereupon the court pronounced the death penalty upon said Charley Smith, to be executed the 11 day of Jan., 1895. Then and there relator prayed an appeal to the March, 1895, term of the supreme court of the State of Mississippi, being the highest court of appeal in the said State, which appeal was granted, and in due course of proceedings the defendant tendered his bill of exceptions to the trial judge, which was duly signed and sealed according to the requirements of law, and that the said bill of exceptions contained the errors of the court's ruling on the motion to quash the indictment and the petition for removal aforesaid, among other assignments, and in due course of proceedings the entire record of proceedings of the trial court was duly certified according to law to the said March term of said supreme court, 1895. Relator states that that court, the highest court of appeal in the State aforesaid, has duly and carefully considered the said record, so duly certified as aforesaid in review, and that said supreme court has considered in its appellate capacity and jurisdiction the respective Federal questions, to wit, the motion to quash the indictment, as made and filed and copied in the said record, and the said petition for the removal of the trial of the said indict-
101 ment to the Federal circuit court, as made, filed, and copied in the record, the whole of which was duly certified as aforesaid. And on the 3rd day and first Monday in June, 1895, the State supreme court aforesaid rendered its judgment, affirming the judgment of the circuit court of Bolivar County, Mississippi, and fixed the 10th day of July, 1895, as the day of execution.

Now, relator charges that the said judgment of said supreme court should be vacated and the cause remanded; that he, said Charley Smith, has not been given a fair trial for his life; that the indictment was not procured and presented against him by a grand jury duly and legally authorized according to law; that he has not been tried and convicted by due course of law; that he has not been accorded equal protection of the laws of the State of Mississippi; that the indictment, trial, and conviction aforesaid is the result of a preconceived plan to deprive relator of his life without regard to his rights under the Federal Constitution and in direct contravention thereof; wherefore your petitioner is ready to submit record proof. Wherefore your petitioner is prays that a writ of error and supersedeas may issue from the Supreme Court of the United States to the said supreme court of the State of Mississippi, and that all proceedings may be staid until the Federal Supreme Court shall hear and determine whether your said petitioner has been indicted, tried, and con-

victed, and sentenced to death according to law and in accordance with the provisions of the Constitution of the United States, and until the further order of the court herein.

Your petitioner further states that no previous application for
102 writ of error or supersedeas has been applied for in this case, and that he is without other remedy.

In duty bound your petitioner doth forever pray.

CHARLEY SMITH,
By CORNELIUS J. JONES, *Attorney.*

GREENVILLE, MISS., *June 7, 1895.*

Writ of error allowed, returnable to the Supreme Court of the United States according to law, the writ to operate a supersedeas, but not to be considered as admitting to bail.

E. D. WHITE,
Associate Justice, Supreme Court of the United States.

MONMOUTH BEACH, NEW JERSEY, *July 6th, 1895.*

THE STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, the undersigned, J. H. Robb, a notary public duly authorized under the laws of said State to administer oaths, Cornelius J. Jones, attorney for Charley Smith, relator in the foregoing petition, who, being duly sworn, deposes and says, that the facts touching the motion to quash the indictment and the petition for removal of his cause to the Federal court, as stated in said foregoing petition for writ of error, are stated by affiant from information obtained from the record of said cause as he recollects the facts to be therein stated at the time of said trial, and verily believes the said facts to be
103 true and correct as therein said petition, and the *the* other facts obtained from relator Charley Smith, and believe the said other facts to be true and correct as stated in said petition upon said information.

CORNELIUS J. JONES.

Sworn to and subscribed before me, J. H. Robb, this the 7 day of June, 1895.

[SEAL.] J. H. ROBB, *Notary Public.*

(Endorsed:) "Filed July 18, 1895. Oliver Clifton, clerk."

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Mississippi, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Mississippi and Charley Smith, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the

United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute
105 of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charley Smith, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of July, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

E. D. WHITE,
Associate Justice Supreme Court of the United States.

(Indorsed:) Filed July 18, 1895. Oliver Clifton, clerk.

106 *Appeal bond.*

Know all men by these presents that we, Charley Smith, principal, and C. J. Jones and H. E. Jones, sureties, are held and firmly bound unto the State of Mississippi in the penal sum of two hundred dollars, well and truly to be paid to the said State of Mississippi upon the following conditions: That whereas on the 27th day of June, 1895, said Charley Smith sued out a writ of error and supersedeas in appeal to the United States Supreme Court for the review of the judgment of the supreme court of the State of Mississippi, rendered in a case wherein he, said Charley Smith, was plaintiff and the State of Mississippi defendant, on the 3rd day of June, 1895; now, then, should the said Charley Smith appear before the United States Supreme Court at the next regular session thereof, or his attorney of record, and prosecute said appeal, as he is bound to do according to law, and that should said appeal be prosecuted with effect and success to the rights of the plaintiff in error, then the above obligation herein set forth is null and void and for nothing held. But should the said Charley Smith, or his attorney of record, fail to appear and prosecute said appeal, or fail to prosecute said appeal with

effect, then this obligation is of full force and virtue, and the sureties herein are bound unto the said State of Mississippi for all costs consequent from the taking of said appeal, and such other judgment as the United States Supreme Court may award in this behalf.

Witness our signatures this the 6th day of July, 1895.

CHARLEY SMITH.
C. J. JONES.
his
H. E. x JONES.
mark

Witness:
T. W. MATHEW.

107 THE STATE OF MISSISSIPPI,
Washington County:

This day personally appeared before me, the undersigned, acknowledging officer for said county, H. E. Jones and C. J. Jones, who, being duly sworn, deposes and say that they each signed the foregoing bond as their own act and deed, and that being personally known to me as the identical parties signed to the foregoing bond. H. E. Jones doth further make oath that they are worth the penalty of the said bond, being two hundred dollars in realty and subject to execution and sale, free from encumbrance; and said C. J. Jones further makes oath that he is worth said penalty, $200.00, subject to execution.

C. J. JONES.
H. E. JONES.

Sworn to and subscribed to before me this the 6 day of July, 1895.

[SEAL.] J. H. ROBB, *Notary Public.*

(Endorsed:) "I approve this bond. Tim E. Cooper, chief justice of Mississippi. Jackson, Miss., July 10, 1895. Filed July 10, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C."

108 UNITED STATES OF AMERICA, *ss:*

To the State of Mississippi, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Mississippi, wherein Charley Smith is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this ninth day of July, in the year of our Lord one thousand eight hundred and ninety-five.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

On this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me the subscriber, C. C. Campbell, deputy clerk of the supreme court of Mississippi, and makes oath that he delivered a true copy of the within citation to Frank Johnston, attorney-general of Mississippi.

C. C. CAMPBELL, *Deputy Clerk.*

Sworn to and subscribed the 6th day of August, A. D. 1895.

[SEAL.] E. M. PARKER, *Notary Public.*

I hereby acknowledge service of this writ.

FRANK JOHNSTON,
Attorney-General of Mississippi.

Aug. 6th, 1895.

(Indorsed:) Filed Aug. 6, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C.

109 STATE OF MISSISSIPPI,
Supreme Court:

I, Oliver Clifton, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing 108 pages contain a true and correct copy of the transcript of the record of the case of No. 8050, Charley Smith v. The State of Mississippi, on appeal to said supreme court from the circuit court of Bolivar county, and lately determined by said court, and copies of the assignment of errors, order of submission, opinion of the supreme court, judgment of the supreme court, petitions for writs of error and orders thereon, appeal bond, original writs of error, and original citation duly served, as the same appear of record and on file in my office.

Witness my hand and the seal of said supreme court, at office at Jackson, this the 10 day of August, A. D. 1895.

[SEAL.] OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

Fees for transcript, $51.50, still due and unpaid.

OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

(Indorsement on cover:) Case No. 16000. Term No., 710. Charley Smith, plaintiff in error vs. The State of Mississippi. Mississippi supreme court. Filed August 22, 1895. Supreme Court U. S., clerk's office. Received Aug. 14, 1895.

On this 6th day of August, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared before me the subscriber, C. C. Campbell, deputy clerk of the supreme court of Mississippi, and makes oath that he delivered a true copy of the within citation to Frank Johnston, attorney-general of Mississippi.

C. C. CAMPBELL, *Deputy Clerk.*

Sworn to and subscribed the 6th day of August, A. D. 1895.

[SEAL.] E. M. PARKER, *Notary Public.*

I hereby acknowledge service of this writ.

FRANK JOHNSTON,
Attorney-General of Mississippi.

Aug. 6th, 1895.

(Indorsed:) Filed Aug. 6, 1895. Oliver Clifton, clerk, by C. C. Campbell, D. C.

109 STATE OF MISSISSIPPI,
Supreme Court:

I, Oliver Clifton, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing 108 pages contain a true and correct copy of the transcript of the record of the case of No. 8050, Charley Smith v. The State of Mississippi, on appeal to said supreme court from the circuit court of Bolivar county, and lately determined by said court, and copies of the assignment of errors, order of submission, opinion of the supreme court, judgment of the supreme court, petitions for writs of error and orders thereon, appeal bond, original writs of error, and original citation duly served, as the same appear of record and on file in my office.

Witness my hand and the seal of said supreme court, at office at Jackson, this the 10 day of August, A. D. 1895.

[SEAL.] OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

Fees for transcript, $51.50, still due and unpaid.

OLIVER CLIFTON, *Clerk,*
By C. C. CAMPBELL, *D. C.*

(Indorsement on cover:) Case No. 16000. Term No., 710. Charley Smith, plaintiff in error vs. The State of Mississippi. Mississippi supreme court. Filed August 22, 1895. Supreme Court U. S., clerk's office. Received Aug. 14, 1895.

JAMES H. C

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

CHARLEY SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI.

No. 710.

BRIEF OF THE PLAINTIFF IN ERROR.

CORNELIUS J. JONES, EMANUEL M. HEWLETT,
Attorneys for Plaintiff in Error.

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OCTOBER TERM, 1895.

Charley Smith, plaintiff in error.
vs. murder
The State of Mississippi. } No. 710.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The criminal prosecution was commenced against the plaintiff in error at the May term, 1894, of the circuit court of the county of Bolivar, State of Mississippi. The first day of the criminal term of said circuit court, the accused was arraigned upon an indictment charging him with the crime of murder and before plea entered, the said accused then and there filed a motion to quash the said indictment, which motion is of record, Page 4. The trial court after considering the same, ordered that the said motion be overruled, to which ruling the accused duly excepted. See record, Page 6.

The accused then and there tendered his special bill of exceptions, which was duly signed at that term of the said court by the trial Judge. See record, page 6.

The case was continued on application of the State to the November term, 1894, of said circuit court. On the first day of the said November criminal term before proceeding to trial, the accused filed a petition for the removal of the trial of said indictment from the said State court to the United States Circuit Court for the Western division of the Southern district of Mississippi, which petition is of record, pages 7 to 9. This petition was denied by the trial court, to which action of the court the accused duly excepted See record, page 9. The court then fixed the third day of said criminal term as the day of trial. The accused regularly and duly ordered subpoenas for all witnesses necessary to establish his defense and saw that said process was in the hands of the proper officer, being the Sheriff of said county of Bolivar On the day fixed for the trial the attorney for the accused was advised from the record of the returns made on the process that no returns had been made by the Sheriff with regard to three material witnesses for the defense, for which witnesses due process had been ordered by him on the same day the pepition for removal was denied, being the first day of said criminal term. The accused then moved the court for a postponement of his trial to a future day of the term, which motion is of record. Page 10. In consideration of this motion the State introduced testimony in resistance to the said motion. See record pages 10, 11, 12, in rebutal to the testimony introduced by the State the accused introduced testimony in support of the motion by cross examination only. See record, pages 9–12. The court overruled the motion to postpone and the accused then and there excepted. See record, page 12–13.

The court then forced the accused to trial and before the jury was sworn or empanelled, the accused filed a motion to quash the weekly venire, which motion is of record, page 13; the court having overruled said motion, the accused then and there excepted. See record page 13 14; the accused was then tendered by the State, a panel of twelve jurors, to which panel the accused excepted by filing a motion to quash the same. See record page 14; the court overruled the said motion, to which ruling the accused excepted. (See record, page 15). The accused then specially excepted to each juror, as tendered him on account of their lack of qualifications, according to the state law. See record of exceptions to Juror Norvel, page 15. The court proceeded with the trial and the accused was promptly convicted, and offered to file a motion in arrest of judgment, establishing a certain state of facts in support thereof; the court refused the accused the right to file any motion in arrest of judgment; and when the attorney for the accused insisted upon his right to file said motion in the interest of the accused, the said trial court demanded of the said attorney for the accused, that he combined the motion in arrest of judgment, and a new trial, and if he, said attorney, further insisted, the court would fine him for contempt, which fact is embodied in the bill of exceptions, page 39 of record. On the fifth day of said criminal term the accused filed a motion for a new trial, distinctly bringing to the notice of the trial court, the error in overruling the motion to quash the indictment, May 1894, term of the circuit court. The error of the court in denying the petition for removal in the November term 1894. The error of the court in denying the motion to postpone his trial to a future day. The error of the court in denying the motion to quash the weekly venire of jurors. The error of the court in denying the motion to quash the panel of jurors: the court after considering the motion for a new trial, overruled the same to which ruling the accused duly excepted; for motion, see record, page 39–41, the order denying the motion, page 41. The accused promptly appealed his case to the Supreme Court of the State; to which court he duly assigned, as errors the rulings of the trial court in denying the motion to quash the indictment; the ruling of the trial court in denying the petition for removal; the ruling of the court in denying the motion to postpone the trial; the ruling of the court in denying the motion to quash the weekly venire of jurors; the ruling of the court in denying the motion to quash the panel of jurors; the ruling of the court in overruling the exceptions of the accused to the qualifications of jurors tendered him; which assignment of errors to the State Supreme Court, is of record, page 42–43. The State Supreme Court at the March term thereof 1895, rendered a judgment affirming the judgment of the trial court; see record, page 44; the accused feeling himself aggrieved thereby applied for, and procured the writ of error, directed to the said State Supreme Court, which application and writ is of record, pages 42–43, and hence the cause is in this court for ultimate review.

Assignments of Error.

The plantiff assigns the following as error:

(1) The trial court erred in overruling the motion to quash the indictment,

Neal vs Delaware—103 U. S. 370.
Strauder vs West Virginia—100 U. S. 303.
Virginia vs Rives—100 U. S. 313.
Bush vs Kentucky—107 U. S. 110.
Ex parte Virginia—100 U. S. 339.

(2) The trial court erred in denying the petition for removal.

Neal vs Delaware—103 U. S. 370.
Strauder vs West Virginia—100 U. S. 303.
Virginia vs Rives—100 U. S. 313.
Bush vs Kentucky—107 U. S 110.
Ex parte Virginia—100 U. S. 339.

(3) The trial court erred in denying the motion to postpone the trial to a future day of the term.

(4) The trial court erred in overruling the motion to quash the weekly venire of jurors

Neal vs Delaware—103 U. S. 370.
Strauder vs West Virginia—100 U. S. 303.
Virginia vs Rives 100 U S. 313.
Bush vs Kentucky—107 U. S. 110.
Ex parte Virginia—100 U. S. 339.

(5) The trial court erred in overruling the motion to quash the panel of jurors.

Neal vs Delaware—103 U. S. 370
Strauder vs West Virginia—100 U. S. 303.
Virginia vs Rives—100 U. S. 313,
Bush vs Kentucky—107 U. S. 110.
Ex parte Virginia—100 U. S. 339.

(6) The trial court erred in overruling the exceptions of the accused to the qualification of jurors tendered him.

(7) The trial court erred in denying to the accused the right to file his motion in arrest of judgment.

(8) The trial court erred in overruling the motion for a new trial.

Neal vs Delaware—103 U. S. 370.
Strauder vs West Virginia—100 U. S. 303.
Virginia vs Rives—100 U. S. 313.
Bush vs Kentucky—107 U. S. 110.
Ex parte Virginia—100 U. S. 339.

(9) The Supreme Court of the state of Mississippi erred in affirming the judgement of the trial court and fixing the tenth day of July 1895, as the day of execution.

Citations.

Slaughterhouse cases 16 Wall. 36—83 U. S. xxi 394.
Strauder vs West Virginia—109 U. S. 303.
Neal vs Delaware—103 U. S. 370.
Prigg vs Connecticut—16 Pet. 539.
Virginia vs Rives—100 U. S. 313
Ex parte Virginia,—100 U. S. 339.
U. S. vs Reese—92 U. S. 214.
100 U. S. 322.
100 U. S. 321 345

103 U. S. 385 551.
107 U. S. 120.
109 U. S. 34 36 44 49 50
112 U. S. 101.
93 New York 446 455 458 460.
50 Connecticut 133.
47 American Report 627.
45 American Report 236 244.
40 American Report 491.
Cooley on Const. lim.—18 note.
3 Green vs Lesse 16 Pet.
pages 291–298.

Argument.

The plaintiff in error respectfully states that the principal issue here presented, is, whether said plaintiff, Charley Smith of the negro race, and color black, was tried in the circuit court of Bolivar County, state of Mississippi, and convicted and sentenced to the death penalty by that trial state court, according to the laws of said state, and the constitution and laws of the United States.

At the May term of the said trial Court, 1894, the accused was indicted by the grand jury of the county aforesaid, for the crime of murder; the said grand jury was composed entirely of white men and great race prejudice prevailed against him with the white race, on account of his race and color; and great prejudice prevailed against the negro race in said county, with the white race on account of its race and color; therefore when the accused was called upon by the court to plead to the said indictment, he then presented and filed a motion to quash the indictment, upon the grounds, that the said grand jury which presented the said indictment, was not a grand jury, duly and regularly drawn and formed by the proper officers of the county of Bolivar according to the laws of said State. The plaintiff in error states, that under the constitution of the State of Mississippi, article 3, section 14 thereof, is the following provision: "No person shall be deprived of life, liberty or property, except by due process of law." And this provision of the organic law of said State was violated by denial to the accused, the benefit therein reserved, because the indictment complained of was presented by a grand jury of the county of Bolivar, at said May term 1894, which grand jury was not listed, delivered, deposited in the "Jury Box" of the county, drawn, summoned, and formed for the duties of a regular grand jury for the term of said court, with regard to the statute law of the State of Mississippi, chapter 68, section 2358 thereof, which provision is as follows: "The Board of Supervisors, at the first meeting in each year or at a subsequent meeting, if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and as a guide in making the list, they shall use the registration book of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them as nearly as it conveniently can from the several election districts, in proportion to the number of the qualified persons in each,

excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors."

The accused charged in said motion to quash the indictment, that the Board of Supervisors failed to respect the law in their selection of names to serve as jurors for the May term of the said circuit court 1894; but that they simply selected a number of names of white persons of the county, to serve as said jurors; and that their order upon the minute Book of their proceedings at which they pretended to order said list selected, shows that they merely selected a list of names for jury service for the "next" term of the circuit court of Bolivar county, in the following words passed as their order.

February 8, 1894 being the first meeting of said year, at which said board attempted to draw jurors for said court "Ordered by the Board that the following named persons be and are hereby selected to serve as petit jurors for the next term of the circuit court," which said order fails to show on its face that the said list of names was selected by the said Board from the registration book of voters of said county; or that said list of persons so drawn were the names of persons, citizens of said county of Bolivar; or that the list of names so drawn was selected according to law; or that said list of names was a list of persons, qualified voters of said county; but the said Board of Supervisors selected said jurors partial to their color, white. That the circuit clerk, chancery clerk and sheriff of said county, selected fifty names as drawn from the jury box of the county, which had been deposited in the jury box, by the circuit clerk, from the list selected as aforesaid by the Board of Supervisors as the jury for the first week of said May term 1894, according to section 2365 of the existing code of the state, adopted in 1892. the grand jurors for the respective circuit courts of the county are required to be drawn from the petit jurors summoned for the first week of the term; said section reads as follows:

"At each regular term of the circuit court, and at a special term, if necessary, the judge shall draw in open court from the jury box, the slips containing the names of fifty jurors to serve as grand jurors and petit jurors for the first week and thirty to serve as petit jurors for each subsequent week, of the next succeeding term of the circuit court; and he shall make and carefully preserve separate lists of the names, and shall not disclose the names of any juror drawn. The slips containing the names so drawn shall be placed by the judge in envelopes, a separate one for each week, and he shall securely seal and deliver them to the clerk of the court, so marked as to indicate which contains the names of the jurors for the first and each subsequent week. If in drawing, it appears that any juror drawn has died, removed, or ceased to be qualified or liable to service as a juror, the judge shall cause the slip containing the name to be destroyed, the name to be striken from the jury list, and he shall draw another name to complete the required number;" this section of the law is quoted to advise the court of the requirement, of the fifty names for the first week; showing, that whoever are drawn for the first week are liable to be drawn on the first day of the term for which they are drawn to serve, as grand jurors, and that though the judge did not draw the jurors for the first week of the said May term 1894, at the previous term of the court, the said grand jury for said May term was drawn, fifty names, summoned for the first

week of said term and thirty for each subsequent week of said term, by the said chancery clerk, circuit clerk, and sheriff of said county, under section 2367 of the existing statute as follows. "Whenever the jurors have not been drawn by the judge in open court, he may draw them in vacation, if convenient, and if he do not, and whenever jurors are required for a special term, and the judge shall so direct, the clerk of the circuit and chancery courts, and the sheriff, shall at the time they should have opened the envelopes, (had they been prepared by the judge under section 2365), draw the jurors for the term of court, and make and certify lists thereof, and the clerk shall issue, and deliver to the sheriff, the proper venire facias" Thus the accused charged, that the said officers of the county, whose duty it was under the law, to select, list, draw and summon the jury for the first week of said May term 1894, purposely violated the state constitution and laws in said selection of jurors.

First the Board of Supervisors of Bolivar county, at the February meeting, 1894, at which meeting they pretended to select a list of jurors for the said May term of circuit court, did not use the registration books of voters for the county in the selection of said jurors for said May term; but that they discriminately selected a certain list of names all being the names of white men to the entire exclusion of all Negroes in the county, though there were in the county at the said time of listing said jurors, thirteen hundred Negroes duly qualified for juror service and only five hundred white men so qualified, and that said exclusion as complained of was by the said Board of Supervisors purposely made on account of the race and color of the qualified persons so excluded.

The plaintiff in error states further, that the sheriff, the circuit and chancery clerks of the county, whose duty it was to draw the names from the jury box preparatory to the holding of the said May term, well knew of the manner and method by which said jury list was selected by the Board of Supervisors, it was further charged by the accused in said motion to quash the indictment, that the wilful and intentional exclusion from said jury list of the names of all qualified persons of color by the said officers of the law, was with the intent and purpose of discriminating against him on account of his race and color, and that the said list of names so prepared by the Board of Supervisors of the county and the clerks and sheriff of the county in drawing the statutory number of fifty names for the first week of the term aforesaid, all members of the white race, did so for the purpose of procuring an indictment against him, because of the great race prejudice prevailing in the said county with the white race against him on account of his race and color, irrespective of the fact of his guilt or innocence of the charge.

The motion was by the trial court overruled, and the accused reserved exception to the ruling of the court, and there and then tendered his special bill of exception thereto, and had the same duly signed by the trial judge. The motion to quash the indictment is of record here in page 4; the special bill of exceptions is of record, page 6.

At the November term of said circuit court, when the State announced itself ready for trial, the accused then and there filed for the consideration of the trial court, his petition for the removal of the trial of the

said indictment presented at the May term 1894, against him for the crime of murder from the circuit court of Bolivar county, to the United States circuit court for the Western division of the Southern district of the State of Mississippi; see record page, 7. The accused charged in said petition, the same illegal practices by the officers of the law, that he charged in the motion to quash the indictment; and further charged that the record of the Board of Supervisors, as shown on the minute book of February the 8th 1894, that there had been no list of jurors by them prepared for the accommodation of the November term of said circuit court, 1894. The last order on said minute book pertaining to said selection of jurors for year of 1894, was that, on February 8th, 1894, wherein they simply ordered that a list of names of persons be, and was selected to serve as petit jurors for the "next term" of the circuit court, which term from that date was that of the May term 1894, at which the indictment was presented, and the order further fails to show that there were any more names selected than required for the transaction of the jury business for the May term aforesaid. The law prescribes that the said Board of Supervisors, should at its earliest practicable convenience in each year, select from the registration books of voters of the county, a list of names of qualified persons, of good intelligence, sound judgment and fair character, and the record of the said Board shows that at their first meeting for the year of 1894, at which it was pretended to select jurors for the said year, for the accommodation of the said circuit court of the county for said year, 1894; said Board failed to select a list of names to serve as jurors for any term of the circuit court of the county, except the May term thereof; and that it is charged in the petition for removal that said Board of Supervisors, did not select any list of jurors to serve at the November term of said court as was their duty under the law. It cannot be urged that the Board of Supervisors intended to comply with the law, or that the presumption, usually attending the regularity of official proceedings, should have been indulged in by the trial court, touching this matter; for the reason that the record of the Board of Supervisors expressly shows upon its face that they intended to select a list of jurors for the May term of the said circuit court 1894; and as the Board of Supervisors had selected no names of persons to serve for the November term 1894, the list of names with which the jury box had been prepared by the circuit clerk, was an illegal list; and that the chancery clerk, circuit clerk and sheriff of said county who were presumed to have drawn the list of jurors for the first week and subsequent weeks of said November term, well knew their said proceedings were illegal and irregular: but the said officers whose duty it was, under the law by virtue of section 2367 already mentioned by us in this brief, to draw said jurors and who by said statute pretended to draw the juries for said November term, purposely and intentionally prepared the jury box, and illegally drew therefrom one entire list of white men to serve as petit jurors for the respective weeks of the said November term, with the intent to discriminate against the accused on account of his race and color; and that should he then be forced to trial under said indictment, he could not be secured a fair and impartial trial by the petit jury which was then summoned and ready to try him.

The plaintiff in error would state that while under the statute he was

entitled to a special venire to try his case, yet it will be observed that the circuit clerk had been charged with preparing the jury box with illegal names, and that all the names with which the jury box had been prepared, were those of white men, purposely made so by the officer so charged: and the special venire would have been drawn from the said jury box so prepared, and the result would have been the same upon drawing of a special venire as was shown to be the cause of complaint to the weekly venire; and that the trial under said indictment before a jury selected and summoned as was the case touching the names deposited in the jury box, whether claiming or waiving a special venire would have been a trial wherein the accused was denied equal protection of the laws of the state; and further it was charged, (and that fact is apparent to this court) that should the petit jury return a verdict of guilty as charged for this crime of murder, the penalty fixed by law is death, and that it was proposed by the trial court by such proceedings to deprive him, the accused, of his life and liberty without due process of law; the accused prayed process of the court for the officers so charged in the said petition that they might be brought to the bar of the court and then and there examined on oath, touching the said charges.

The court will observe that these charges were grave and should have stimulated the judicial activity of the trial court; but without any proof on part of the State, notwithstanding the fact that the petition was duly sworn to by the accused upon knowledge and belief, that court denied the petition and forced the accused to trial before a jury of white men, purposely selected for their known prejudice to the accused, which order of denial is of record. Page 9.

The accused then moved the court to quash the weekly venire of jurors, alleging substantially the same grounds therefor, as were alleged in the motion to quash the indictment, and the petition for removal; except that it was further charged in said motion to quash the weekly venire, the persons who had been summoned for the second week of said November term to serve as petit jurors for said week, were not the same persons who had been drawn by the sheriff and the clerks of the county as were shown by the minutes of the first day of the term; therefore the said jurors for said second week, were not summoned according to due procese of law. The laws of the State of Mississippi expressly provide how jurors shall be drawn and summoned, and in a case of this character, where human life depends upon the verdict of such a jury, the accused was entitled to every benefit prescribed by the laws. The officers of the law were n t warranted in selecting a class of persons consistent with their personal wishes or convenience; and when this fact was made known to the trial court accompanied with the affidavit of the accused, which affidavit was upon his knowledge and belief, we seriously contend that it became the duty of the court to have investigated this flagrant charge, and there coming no proof in rebuttal from the state, it clearly disclosed a willful violation of the rights of the accused to a trial by due course of the laws of the state, and said petit jurors being all white men so selected by the officers as charged on the account of race and color, white, to the exclusion of all negroes from said jury though otherwise qualified to the number of thirteen hundred, purposely on account of their race and color was a discrimination against him on account of his race and color which the trial court

should have remedied, by sustaining the motion to quash the weekly venire, but the court promptly overruled said motion to which ruling of the court the accused duly excepted for motion and order overruling same, see record, page 12 and 13. The accused was forced to trial by the court and the jury panel as accepted by the state was tendered the accused, whereupon said accused duly filed his motion, to quash the panel of jurors so tendered him by the state, alleging as grounds therefor, substantially the same as alleged in the several previous motions and petition for removal; it was further charged by the accused that there was another grave irregularity in the proceedings of the trial court as shown on the minutes of the first day of the November term; touching the duties of the administrative officers of the county, relative to the listing and proceedings as directed by section 2366 of existing statute thus: "The clerk shall safely keep the envelopes without opening until within fifteen days of the term for which the jurors were drawn" (this a limitation upon the circuit and chancery clerks and sheriff of the county under section 2356) "and shall then in the presence of the sheriff and clerk of chancery court, open the envelopes and make a list of the names in each; each list shall be certified by those officers to be correct, and on each, they shall certify whether the envelopes containing the names appeared to have been opened or disfigured. The several lists of jurors with the certificates shall be copied into the minutes of the first day of court. After making and certifying the list, the clerk of the circuit court shall forthwith issue and deliver to the sheriff a separate venire facias for the jurors for each week, returnable on the proper day" This law was not observed by the officers of the court, nor by the court itself; because when this irregularity was pleaded by the accused in the trial court, particularizing that the conduct of the jury officers was highly objectionable and illegal, as has been shown throughout this entire record, and the minutes of the first day of the November term 1894, fails to show that there were any jurors regularly drawn, listed, summoned and returned by the sheriff of the county for the said November term; there was no certificate of the circuit clerk, chancery clerk and sheriff as the law directs, to the fact that any such jurors were drawn for said November term, nor to the regularity of any drawing of such jurors.

The legislature of the state evidently had some object in requiring the said officers of the county to certify to the circuit court, as to the regularity of their acts concerning the matter of procuring jurors for the several terms of court, and when these officers of Bolivar county failed to certify that their acts pertaining to the drawing of the list of jurors for the respective weeks of said November term, and the minutes of the first day of the said November term failing to show such a certificate which should have been attached to each seperate list of jurors for the respective weeks of the entire November term, and the panel of jurors thus tendered the accused, purporting to be a jury for the second week of said term, and the trial court, in the light of all these facts still forcing the accused to be tried by such a jury, in our opinion was a mockery upon human justice. When the law distinctly prescribes that a certain proceeding shall be had in a specific mode, to be authenticated in a specific manner, and that record of these transactions must be at a certain time made in a cer

tain manner, specifically directed by the laws pertaining to this matter, we urge and seriously contend that the failure of the proper officers to do their full duty in this behalf as prescribed by the laws, and in the manner prescribed by the laws, and authenticate the same as prescribed by the law, cannot be cured by any subsequent acts or orders of the trial court. We charge violation of official duty with regard to the acts of the administrative officers of the county, and to prove the charges we refer to the record as shown by the copy of the first day's minutes of the said November term. See record, page 1. It is true that of the fifth day of said November term after the accused had filed his motion for a new trial, and before the court acted upon said motion, having taken the same under advisement, after it had been submitted by the accused, wherein these irregularities had been again brought to the notice of the court, the court entered into an ex parte inquiry, without notice to the accused or his attorney, and finding that the minutes were irregular in the respects charged, ordered the minutes of the said first day so changed in every respect and particular which was complained of by the accused in his various motions before conviction and brought forward in the motion for a new trial; the court aiding the officers so charged by directing proper lists and certificates to be made, and the prosecuting attorney actually copied the certificate so wanting, from the statute, and the officers, clerks and sheriff copied a new list of jurors as they should have done before the first day of the term, and signed the certificate copied by the prosecuting attorney, all under the supervision of the trial judge without giving the accused any opportunity of controverting any of such proceedings and ordered this matter to be spread upon the minutes of the fifth day of the term as an order *nunc pro tunc;* after which order, the court then informed the attorney for the accused that it would now determine the motion for a new trial, and promptly overrule the same; the accused duly excepted to such conduct of the court, as shown by the bill of exceptions herein; it is also shown by the record here that the court declined to entertain any motion in arrest of judgment, and threatened to fine the prisoner's attorney for contempt to the court because he urged and insisted upon his right; to make that motion separate and independent to the motion for a new trial. It was in this motion in arrest of judgment that the conduct of the district attorney, the circuit and chancery clerks and sheriff of the county under the personal directions of the court, was complained of by the accused, and the prisoner's attorney then and there openly protested against such actions on the part of the court and officers and excepted to the denial of the court to him, the right to make such motion in arrest of judgment. Now then it might be urged by the defendent in error, that under the State law, no exceptions to the grand jury could have been taken or the indictment quashed after the said grand jury had been empanelled and sworn; this feature of our State law as to the accompanying presumption of regularity of all the proceedings touching the question of the illegality or legality of a grand jury as prescribed by the legislature which might temporarily justify this position of the defendent in error is section 2375 of existing statute as follows: ' Before swearing any grand juror as such, he shall be examined by the court on oath, touching his qualification; and after the grand jurors shall have been sworn and empan-

elled, no objection shall be raised by plea or otherwise to the grand jury; but the empanelling of the grand jury shall be conclusive evidence of its competency and qualifications; but any party interested may challenge or except to the array for fraud."

The rule laid down in this section, no doubt, was prescribed with the view of protecting the machinery of the court from many technical pleas, and objections which are possible to be brought forward in most every case where an indictment is returned by a grand jury, and such latitude would subject the court to untold inconveniences, and the commonwealth to enormous expense; no serious objection could be urged to the statute in that behalf, because the same statute provides an exception, which exception is all that we could desire, as a saving, consistent with the Constitution of the State, Article 3, Section 14 thereof, that no person shall be deprived of his life, liberty or property except by due process of law.

The saving to each individual who may be interested in the indictments, returned by a grand jury as announced as the exception in Sec. 2375 of the statute, is in happy accord with the reservation in the State Constitution afore particularized; and although the State Supreme Court in the cases of Head vs. the State, 44 Miss.—731, Durah vs. the State, 44 Miss. —789, declared that "This statute completely cuts off the plea in abatement, challenging the fitness and qualifications of the grand jury or any of its members," the ruling of the State Supreme Court was not with respect to the section of our existing statute just quoted; because the enactment of this statute was declared in 1892, and subsequent to this decision of our honorable State Supreme Court; and the people of the State enacted, Article 3, Section 14 of the organic law, subsequent to the said decisions of the State Supreme Court. Our motive in directing the attention of the court to these decisions and provisions is to clearly sympathize with the trial court in all that was done in connection with this case up to the time of filing the motion to quash the indictment; and to show further, that it became the duty of the trial court to take judicial notice of any material irregularity which might have been regularly pleaded in the course of its proceedings in the matter in question; and as the law provides that any interested person may except to the array, it might be well just here, to say that the accused had no opportunity to except to the grand jury during the selection thereof by the Board of Supervisors, whose duty it was to select, list and certify the same to circuit clerk of the county, because this proceeding was had on the 8, February 1894, in vacation of court. He could not except to the sheriff's return of said jurors, or the organization proceedings of the said grand jury on first day of May term, 1894, because he was incarcerated in an iron cell and up to the time of arraignment he did not and could not have been considered a person permitted to except to the said grand jury, and hence the first opportunity which presented itself was that opportunity seasonably embraced by the accused in the form of a motion to quash the indictment, and further, the plaintiff in error asserts that it makes no difference what the statute of the State provides if that statute is inconsistent with the principles underlying the Federal Constitution or the Federal statutes the latter being the higher laws, must prevail.

The grounds alleged as the basis of the motion to quash the indict-

ment seem to be sufficiently substantial to have invited the judicial notice of the trial court; they are sufficiently strong to have overthrown the standing presumption of the regularity of the official proceedings, by which the said grand jury was formed and thus clearly exercises the right vouchsafed him in the State Constitution, Article 3 thereof, and the statute of the State, Section 2375.

It will be observed that the officers charged by the accused in said motion, were, the members of the Board of Supervisors of Bolivar county, the circuit and chancery clerks, and sheriff of said county; and the character of proof by which the motion to quash, was supported, clearly brought the case within the law declared by this court, in the case of Strauder vs. West Virginia, 100 U. S.—303.

This state of facts clearly presented, duly testified to by the affidavit of the accused, wherein Justice Strong delivered the opinion of this court said: "We have said more than once that its (Fourteenth Amendment) design was to protect an emancipated race; and to strike down all possible legal discrimination against those who belong to it. To quote further from 16 Wall [supra]. "In giving construction to any of these articles of amendment, it is necessary to keep steadily in view the main purpose; it is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." This court further addressing itself to the spirit of that amendment in that case said, "Any state action that denies this immunity to a colored citizen is in conflict with the constitution; a right or immunity whether created by the constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." Prigg vs. Com. 16 Pet. 536. "Rights and immnnities created by or dependent upon the Constitution of the United States, can be protected by Congress; the form and manner of the protection may be such as congress in the legitimite exercise of its legislative discretion shall provide; these may be varied to meet the necessities of the particular right to be protected." This court further declared in the Strauder case. "But there is express authority to protect the rights and immunities referred to in the 14th amendment, and to enforce observance of them by appropriate congressional legistation; and one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from the State court in which the right is denied by the State law into the Federal Court, where it will be upheld." Slaughterhouse cases 16 Wall, 36.

Neal vs Delaware—103 U. S. 370.

Wherein Mr. Justice Harlan delivering the opinion of the court among other things said, "While a colored citizen, party to a trial involving his life, liberty or property, cannot claim as a matter of right that his race shall have representation on the jury, and while a mixed jury in a particular case is not within the meaning of the constitution or always necessary to the equal protection of the laws; it is a right to which he is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, or no discrimination against them because of their race and color."

These opinions of this honorable court are based upon the same state of facts substantially as those stated in the case at bar. We admit that

the accused in the case of Strauder vs West Virginia, filed a motion to quash the array of jurors and the panel of jurors; but as we are disposing of the first assignment of error, we shall define our position as to the assignments in their order.

It will be observed that we charged that the right to equal protection of the laws of the State of Mississippi was denied the accused, and that he was discriminated against in the trial court on account of his race and color, and we contend that the trial, under such indictment, procured and returned as herein complained of as shown in the motion to quash, was a gross violation of his rights under the Fourteenth Amendment of the Federal Constitution. This law of the Constitution must be liberally construed as this court has repeatedly declared, and because of the fact that the letters of the Constitution do not declare that no officer of the State, or agent, or any person acting by the authority of, and in the name of the State, shall abridge the privileges or immunities of any citizen of the United States, nor discriminate against any person within its jurisdiction, nor to deprive any one of life, liberty or property except by due process of law; yet the spirit of the law being the intention of the people of the country at the time this law was enacted, directs this injunction against such officers agents and persons in authority by such State, and the violation thereof by any of said persons in authority is a violation of the Constitutional inhibitions on the part of such State. The second assignment of error was the ruling of the trial court in denying the petition for removal. The grounds alleged in the said petition were substantially the same as those in the motion to quash the indictment, except that a further charge was made that there had been no petit jurors listed and certified for the weekly venires for the November term of the circuit court of Bolivar county by the Board of Supervisors of the said county, and that the circuit and chancery clerks and sheriff of said county did not draw legally any petit jurors for said November term, at which term it was proposed to try the accused for his life, by a set of men purporting to be a petit jury and a set of men, summoned and answering as petit jurors for the second week of said term, from which weekly venire it was proposed to select a panel of twelve jurors to try the accused; were selected by the officers of said county, who acted in their official capacity, purposely and intentionally discriminated against the accused in thus selecting said persons as jurors, well knowing that the accused would be put upon his trial in said second week of the term, thus seeking to, and did, deprive him of his liberty, and further sought to deprive him of his life without due process of the laws of the state The trial court denied the petition in the face of the sound doctrine laid down by this court, in the case of Strauder vs West Virginia. We contend in this behalf for the application of the great principles underlying the mere letters of our constitution or our Federal statutes; these principles, as the court has well declared, are firm and lasting. As to the liability of the state for the acts of the officers, as charged in our several motions to quash the array and panel of jurors as well as the motion to quash the indictment and petition for removal, is clearly settled by the opinion of this court, Ex Parte Virginia, 100 U. S. 339; Virginia vs Rives, 100 U. S. 313.

The court will observe from its opinions handed down in these cases, that from the charges made by the accused, we are justified in alleging

the injury in which complaint is here made, to be on part of the state of Mississippi: all the said motions and petition for removal were duly sworn to by the accused upon knowledge and belief, and such facts are alleged in the motion to quash the indictment duly sworn to upon knowledge and belief by the prisoner, made it the duty of the court to have quashed the said indictment as declared by this court, in Neal vs Delaware—103 U. S. 370. The petition for removal having the state of facts alleged as shown thereupon, duly sworn to upon knowledge and belief by the prisoner, entitled him to the removal of his case as prayed for in said petition, so declared by this court in Strauder vs West Virginia—100 U. S 303.

The motion for a postponement of the trial page 10 of record clearly shows that the accused had used due diligence to procure his witnesses and was being forced to trial, and was forced to trial without the benefit of the return of such process which he had diligently procured, and hence was deprived of the compulsory process for such witnesses as he was entitled to under the laws of the state, hence denied the due process of law; a right guaranteed him under the Federal Constitution.

The motion to quash the array and panel of jurors as shown of record herein page 14; and duly sworn to upon knowledge and belief by the prisoner; entitled him to the relief therein prayed for to wit: that the array and panel should have been quashed respectively as declared by this court in Strauder vs West Virginia—100 U. S. 303; Neal vs Delaware—103 U. S. 370; Bush vs Kentucky, Ex parte Virginia—100 U. S. 339.

The Supreme Court of the state of Mississippi having affirmed the decision of the trial court on appeal, wherein all the respective errors complained of by the accused were reviewed; the reason suggested by that court, judging from the language of its opinion, see record page 44, was that, as in the Gibson case no motion to quash the indictment was made, the petition for removal was properly denied by the trial court; yet when that court reaches *this* case on the docket, wherein a motion was made to quash the indictment and the *petition for removal*, decided that the petition for removal was properly denied by the trial court for the reasons assignad in the Gibson case.

We must confess that we fail to understand that learned court; because the history of the Smith trial differs from that of Gibson. Gibson made no motion to quash the indictment in the trial court, and for that reason the State Supreme Court affirmed the judgment of the trial court in the case. In the Smith case, the case at bar, the accused made a motion to quash the indictment, filed his petition for removal, motions to quash the array of jurors, and the panel of jurors, yet that honorable court held that the reason assigned by them in the Gibson case, was why they held that there was no error in everruling the prisoner's motion to quash the indictment; we therefore leave to this court the task of reasoning out the applicability.

In the matter of sustaining the trial court, in denying the petition for removal in this cause, that honorable State Supreme Court decided that there was no proof in support of the petition; that the affidavit attached was upon knowledge and belief; and sited the case of Neal vs Delaware wherein they claimed that affidavit of the prisoner was only taken as proof in the trial court of Delaware, upon agreement between the attorney general, and counsel for the accused. We beg with all due respect and defference to the honorable Supreme Court of Mississippi, the lib-

erty of disagreeing with it; the prisoner in the case of Neal vs Delaware, filed his petition for removal and swore to it upon knowledge and belief; no objection was made on part of the state to the character of proof attached; the petition was disposed of by the trial court upon other and different grounds; after the petition was denied, the accused made a motion to quash the indictment, and the counsel for the accused, and the attorney general for the state, agreed that the motion to quash the indictment should be considered, the same, as if the affidavit which was attached in support of the petition for removal, were attached to the motion to quash the indictment. This agreement seemed to have been made with a view to convenience to all parties at the time; not that it should be accepted as a *degree* of proof, but, as proof, such as was offered in support of the petition for removal, and thus the motion to quash the indictment, which really had no proof attached, was considered the same by the trial court, as though the affidavit agreed upon were physically attached.

We further take issue with the honorable supreme court of Mississippi in exacting any other satisfaction of the accused as to his knowledge of things sworn to in the affidavit reviewed by it, than what the affidavit showed upon its face. The question as to whether the affiant's knowledge was personal or not, was a matter of fact, which the trial court was asked by the accused in his motion to quash the indictment, and his petition for removal to inqure into; the said affidavit shows upon its face, that the accused personally appeared before an acknowledging officer being the circuit clerk of the said county, and there deposed the same; Section 1741 of existing statute prescribes as follows; "The accused shall be a competent witness for himself in any prosecution for crime against him, etc." and thus the character of the knowledge of the accused, was clearly defined by the language of the affirmation, and hence the supreme court of Mississippi was bound in this behalf by the law announced in the case of Neal vs. Delaware, as follows; "An affidavit of the prisoner that the citizens of color were so excluded because of their color, supported by the fact that out of one hundred and fifty thousand population, no one of the twenty thousand colored persons included therein has ever been summoned as a juror, is a prima facia case in support of the motion."

The record will show the sufficiency of the affidavit; and as this court has declared the character of proof necessary to establish a *prima facia* case for relief as applied for in the motions to quash and the petition for removal in this cause, the Supreme Court of Mississippi had no right or authority to evade the law laid down by this court. The accused charged in his affidavit that he was purposely discriminated against by the officers of said county on account of his race and color, because said officers purposely excluded from the jury which presented the indictment against him at the time of the selection thereof, all members of his race though qualified for such service to the number of thirteen hundred, on the account of their race and color; this affidavit was materially stronger than the one in the case of Neal vs Delaware; the motion to quash the indictment should have been sustained, and we contend that under the law handed down by this court, it should have been, the petition for removal, the motion to quash the array and panel of jurors should have

been sustained; as announced by this court in Strauder vs West Virginia, wherein this court declared that the trial court in Virginia, first erred in overruling the petition for removal, second erred in overruling the motion to quash the indictment, and further erred in overruling th e motions respectively to quash the array and panel of jurors.

We need not prolong this argument to further convince this court; the fact is so clearly one of discrimination against the accused by the administrative officers of the law in said Bolivar county, and the approval of the same by the organized judiciary of the State, that this brief mentioned will clearly satisfy this honorable court of the soundness of our contention, when the organized courts of the State of Mississippi failed to recognize the law declared by this court by which the Fourteenth Amendment to the Federal Constitution, and Section 641 of the Revised Statute of the United States were construed, the action of the said State courts were in derogation of the doctrine of this court as handed down by Mr. Justice Marshall in Cooley upon Constitution limitations, Page 18, Note 3. Green vs Lesse. "We receive the construction given by the court of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statutes. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction."

Respectfully submitted,

CORNELIUS J. JONES,

EMANUEL M. HEWLETT,

Attorneys for Plaintiff in Error.

FILED,
DEC 19 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

CHARLEY SMITH, PLAINTIFF IN ERROR.

No. 710, vs.

THE STATE OF MISSISSIPPI, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE STATE OF MISSISSIPPI.

The Supreme Court of the United States.

October Term 1895.

CHARLEY SMITH, PLAINTIFF IN ERROR.

No. 710. vs.

THE STATE OF MISSISSIPPI, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE STATE OF MISSISSIPPI.

STATEMENT.

The plaintiff in error was indicted, tried and convicted for the murder of Wiley Nesby in the Circuit Court of Bolivar County, in the State of Mississippi, at the November Term 1894, of said Court.

There was an appeal taken by the accused to the Supreme Court of the State, and various errors were assigned. Upon the trial of the appeal the Supreme Court of the State sustained the verdict of the jury on the evidence, and affirmed the judgment of the Circuit Court, and on June 3rd, 1895, fixed the day for the execution of the accused.

To this judgment of the Supreme Court of the State, the accused has obtained a writ of error from this Honorable Court, and asks that the action of the Supreme Court of the Sate, upon the alleged Federal question involved, may be reviewed.

Upon the coming in of the indictment, and upon being arraigned in the Circuit Court of Bolivar County, the accused

made a motion to quash the indictment upon the following grounds:

"First. Because the grand jury which was empannelled, sworn, and charged on the first day of the May Term of the Circuit Court, 1894, and which said jury presented the said indictment herein aforesaid, was not elected by the Board of Supervisors of said county of Bolivar, State of Mississippi, at the February session thereof, 1894, according to law, in this, that at which said session thereof said Board of Supervisors selected a list of names of persons to serve as jurors, to serve at the regular terms of the Circuit Court of said county for the year 1894, which order of said Board of Supervisors, as appears of the record of that said proceeding at that said session, fails to show that the said list of names of said persons as was selected by said Board of Supervisors at said meeting for said purpose were selected from the registration roll of said county of Bolivar, State aforesaid, or that the said list of persons, so drawn, were the names of persons citizens of said State and county, or that the said jurors were drawn or selected by the said Board of Supervisors according to law, or that the said list of names of persons so selected as aforesaid for the purposes aforesaid were qualified voters of said county at the time of said selection, or that the said Board of Supervisors of said county used the registration roll of said county as their guide in making said list of names of persons to serve as jurors for the purposes and times afosesaid. The record of said proceedings of said Board of Supervisors, defendant is advised, appears in minute book E, page 633, duly authenticated and now on file in the Chancery Clerk's office of said county.

"Second. The said Board of Supervisors selected the said list of names of persons to serve as jurors of said county for the times of the Circuit Court of said county, partial to other qualifications possessed by said persons, towit, "good intelligence, sound judgment, and fair character," which qualifications are not enumerated in the specific qualifications enumerated in the Constitution of the State of Mississippi, as required of jurors, grand and petit, in State Courts, and the said grand jury which indicted the defendant herein were selected from the said list of jurors, and was not an impartial jury, as guaranteed by the Constitution of the State aforesaid and the United States, of which defendant is a citizen of color, black; and it is further charged that because of the prejudice against him and his race on account of their color, the grand jury aforesaid was purposely

selected of the white race, to the exclusion of the colored persons of the county competent for jury service, by the officers charged thereof with under the State law, on account of their color, for the purpose of procuring this indictment against defendant, in violation of his constitutional right to be tried for his life upon the charge of murder herein in the Circuit Court of Bolivar county, State aforesaid.

"Third. Further, and ask subpœnas for said officers to prove the same. The certificate of the Circuit Clerk, the Sheriff, and Chancery Clerk of said Bolivar county, which is attached to the list of persons drawn by the Circuit Clerk of said county, in the presence of said Chanrery Clerk and Sheriff of said county, said persons so drawn being selected to serve for the May term of said Circuit Court, 1894, and now recorded on the minutes of the Circuit Court of Bolivar county, Mississippi, for the first day of said term of Court, which said certificate is erroneous and void as to the authenticity ot the said drawing of said jurors by said officers aforementioned—Circuit Clerk, Chancery Clerk, and Sheriff of said county—in this, that the said certificate does not show upon its face the Statutory allegation whether the envelopes containing the names appears to have been opened or disfigured, the lack of which authenticative certificate vitiates the legality of said jury list; and the grand jury aforesaid, drawn from said list, on the first day of the present term and presented the indictment aforesaid against defendant, was not a duly elected and legally empannelled grand jury as contemplated in the guarantee of the Constitution of the State of Mississippi and the Constitution of the United States.

CHARLEY SMITH.

Sworn to and subscribed to before me, the undersigned Circuit Clerk of Bolivar county, Mississippi, this the 17th day of May, 1894, as to the best of his knowledge and belief.

CHARLEY SMITH,
J. E. OUSLEY, Clerk.

This motion was overruled by the Circuit Court of the State.

At the November Term 1894, of the Circuit Court of Bolivar County, the accused filed a petition for the removal of the case to the United States Circuit Court for the Western Division of the Southern District of the State of Mississippi. The grounds for the removal are the same as those stated in the motion to

quash the indictment, and it is unnecessary to repeat them. This petition was verified by the affidavit of the accused in the following form:

"STATE OF MISSISSIPPI,
BOLIVAR COUNTY:

This day personally appeared before me, J. E. Ousley, Circuit Clerk of said county, Charly Smith, who makes oath that the facts set out in the foregoing petition are true to the best of his knowledge and information and belief.

CHARLEY SMITH.

Sworn to and subscribed this 29th day of Nov. 1894.

J. E. OUSLEY, Clerk."

This application for removal was denied by the trial Court.

When placed upon his trial, the accused made the following motion to quash the regular venire of jurors summoned for the second week:

"Now comes the defendant in this cause and moves the Court that the venire of jurors summoned by the Sheriff for the second week of the present term of this Court be quashed.

First. Because they have not been regularly drawn from the jury box by the officers of the county, whose duty it is, under the law, to draw the venire for the said second week of said term, to wit, the Chancery and Circuit Clerks and Sheriff of the county, and that said list of the venire, as appears in the record of the first day's proceedings of the term, is not certified to by the officers of the county charged with the selection of the jury as the law directs, but said jurors as now answer to their call as said venire for said week is an illegal venire, and a trial by said jurors or any of them as such venire will be contrary to his rights under the Constitution of the State of Mississippi and his rights under the Constitution of the United States, and that defendant being a citizen of the State of Mississippi and of the United States he insists upon his right to be tried for this offense by due course of law.

CHARLEY SMITH.

STATE OF MISSISSIPPI,
BOLIVAR COUNTY.

This day personally appeared before me J. E. Ousley Charley Smith, who makes oath that the facts herein set out in the foregoing motion are true and correct to the best of his information and belief, and that his source of information is the record of

the first day's proceedings of the November term of the Court.

J. E. OUSLEY, Clerk.
JOHN L. GILL, D. C."

This motion was overruled by the Circuit Court.

The entry on the minutes of the Circuit Court in respect to the drawing of the jurors for the regular panel, is as follows:

"Whereupon the minutes were corrected, as appears in Minute Book "I," page 523, as follows, towit:

"The following jurors were duly and legally and at the time required by law, and drawn in vacation by the Sheriff, Clerk of the Circuit Court, and Clerk of the Chancery Court, to serve as jurors for the third week of the term beginning on Monday, December 3rd, 1894, and the list thereof was duly made and certified, as follows, towit:

In Circuit Court, Bolivar County, November term, A. D., 1894. List of names drawn by Circuit Clerk, Sheriff, and Chancery Clerk, by direction of the Honorable R. W. Williamson, Presiding Judge of the Fourth Judicial District of the State of Mississippi, for the November term of our said Circuit Court of Bolivar county, beginning on the first Monday of December, A. D., 1894, for the week of said term beginning on the 3rd day of December, A. D., 1894.

LIST OF JURORS.

J. W. Thomas	2	F. B. Keller	2
James Bradshaw	2	J. J. Ferguson	2
G. L. Wrenn	2	L. Ballow	4
R. H. Montgomery	3	J. C. West	1
D. Wilson	3	C. W. Flowers	3
John B. Walton	3	N. F. Gloze	3
John T. Kuhn	3	R. D. Miller	5
S. W. Roark	3	Frank Wright	2
W. R. Woolfolk	3	W. L. Key	5
J. A. Cayo	5	R. T. Torrian	3
W. D. Arnold	3	J. A. Chamberlain	2
J. E. Edmonds	4	W. R. Sheppard	1
E. D. Dewberry	1	Price Blanchard	2
G. W. Smith	4	W. W. Johnson	3
W. D. Patrick	3	John Dixon	3

THE STATE OF MISSISSIPPI,
COUNTY OF BOLIVAR.

We, J. E. Ousley, Clerk of the Circuit Court of Bolivar

county, George P. Melchior, Sheriff of Bolivar county, and T. R. McGuire, Chancery Clerk of Bolivar county, do hereby certify that by direction of the Honorable R. W. Williamson, Presiding Judge of the Fourth Judicial District, we, on the 5th day of November, A. D., 1894, being the day set by law, in the Circuit Clerks office of said county, drew from the box known and kept as "jury box," the names above written, to serve as jurors at the next term of our Circuit Court, to be holden at Rosedale, in said county, beginning on the first Monday of December, A. D.. 1894, and that said list of jurors were drawn for the week beginning on Monday, the 3rd day of December, A. D., 1894.

Given under our hands this the 5th day of November, A. D., 1894.

[SEAL.] J. E. OUSLEY, Circuit Clerk.
G. P. MELCHIOR, Sheriff.
T. R. MCGUIRE, Chancery Clerk."

The accused made a motion for a postponement of his trial on the ground of the absence of three witnesses, which motion was overruled by the Court.

The accused was indicted and arraigned at the May Term 1894, of the Court. At the trial in Dec. 1894 he introduced a number of witnesses. The three absent witnesses were Wash Lott, George Scofield and Johnston McCraney. The accused never directed subpœnas for them untill the 28th day of November 1894. There were six witnesses examined on the hearing of this motion in the Circuit Court. Wash Lott, it appeared, was implicated in the homicide, and his whereabouts was unknown. A subpœna issued for some of the defendants witnesses on November 17th, had been returned not found. Scofield was in Washington, and in a dying condition.

The facts of the case seem to have been quite fully developed by the witnesses who testified for the State and the accused respectively on the trial. It does not appear that any injustice was done the accused by not postponing the trial of the case.

BRIEF.

On the appeal to the Supreme Court of the State the accused assigned for error, among other grounds, the action of the Circuit Court in overruling his motion to quash the indictment, in denying his application for the removal of the case from the State Court to the Federal Court, and in overruling his motion to quash the panel of jurors by whom he was tried.

THE REMOVAL OF THE CASE.

It was expressly decided by this Court in Neal vs. Delaware, that the Fourteenth Amendment was broader in its operation than Section 641 of the Revised Statutes providing for the removal of cases from the State to the Federal Courts.

Where a State has not, since the adoption of the Fourteenth Amendment to the Constitution of the United States, enacted any laws in violation of said amendment, involved in the case, the right of removal does not exist. It will be assumed that the constitutional rights of the citizen will be properly and legally observed and enforced in the State Courts, and if in the trial of the cause, any rights secured by the Federal Constitution are disregarded by the State Court, the remedy for their enforcement is ultimately to the Supreme Court of the United States upon writ of error.

Neal vs. Delaware, 103, U. S. 370.

This was the ruling of this Court in the cases of,

Strauder vs. West Virginia, 100, U. S. 303.
Virginia vs. Rives, Ind. 313.
Ex parte Virginia, Ind. 339.

There are no statutes in existence in the State of Mississippi that are in violation of the Fourteenth Amendment, or of any of the amendments to the Federal Constitution. It is therefore respectfully submitted, that the application for removal was properly denied.

MODE OF SELECTING JURORS.

SECTION 2358, of the Mississippi Code of 1892, provides as follows:

"The Board of Supervisors, at the first meeting in each year, or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the Circuit Court for the next two terms, to be held more than thirty days afterwards, and, as a guide in making the list, they shall use the registration books of voters, and it shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as it conveniently can, from the several election districts, in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a sufficiency of jurors."

It is stated as one of the grounds for the removal of the case, that this Statute is in contravention of section 264 of the State Constitution of 1890, in this, that it adds other qualifications for jurors not enumerated in the constitutional provision, in the directions to the Board of Supervisors that persons of "good intelligence, sound judgment, and fair character," should be selected. The Statue is clearly not in conflict with the provision of the State Constution. Section 264 of the Constitution declares that no person shall be a grand or petit juror unless he is a qualified elector, and able to read and write. But it does not provide that these shall be the only qualifications, nor does it directly or by implication place any limitations on the power of the Legislature of the State to add other qualifications. The Legislature of the State has the plenary power of prescribing the qualifications of jurors, provided the laws on the subject do not discriminate against any class of citizens within the meaning of the Constitution of the United States and the amendments thereto. The provisions of the State Constitution above cited, imposed the limitation on the legislative power that the qualifications provided by the Constitution could not be dispensed by the Legislature, but it does not contain the denial of

the power of the Legislature to add other qualifications. The directions of this Statute are wise and salutary. They are such as would be observed by any court having the power in the selection of its jurors. Even if this Statute was in conflict with the Constitution of the State, it would not present a Federal question, nor would it constitute any ground for the removal of the cause from the State to the Federal Court, as the Statue applies equally and without discrimination to all the people of the State.

THE MOTION TO QUASH THE INDICTMENT.

All that was before the Circuit Court of Bolivar County on the motion of the accused to quash the indictment, and all that was before the Supreme court of the State on the appeal, was the motion itself verified by the qualified and imperfect affidavit of the accused.

No evidence was introduced, and none was offered by the accused on the hearing of the motion, nor was the accused denied the process of the Court by which to secure the attendance of witnesses, or the production of books or papers to prove the averments made in his motion.

Upon the whole case, the Supreme Court of the State, gave the following opinion:

"WOODS, J., delivered the opinion of the Court.

The action of the Court below in overruling the application for removal was not error. See John Gibson vs. State, decided at the present term of this Court.

The motion to quash the indictment was properly denied. There was either no evidence offered in support of the motion, or if offered, it does not appear in the record, and in this case we can do nothing but affirm the aetion of the court in denying this motion.

The affidavit appended to the motion in its terms affords no sort of evidence, (even if it had been agreed to be considered as such, as was the case in Neal vs. Delaware, 103 U. S. 370) that the affiant had any personal knowledge touching any of the facts relied upon as grounds for upholding the motion. It

was made, "as to the best of affiant's knowledge and belief," and yet the affiant may have no personal knowledge whatever as to any of the material facts. The affidavit was not evidence to support the motion. In Neal vs. Delaware, *supra*, the verified petition for removal was treated by the court as evidence for the motion to quash, because of the agreement of the Attorney-General of Delaware with the prisoner's counsel to that effect, as the same was construed by the majority of the court.

We find no reversible error in any of the other rulings complained of.

Affirmed."

I presume that the counsel for the accused in the Circuit Court of the State, assumed, or supposed, that the motion, with the annexed affidavit of the accused, as shown by the record, as a matter of law or of practice, made a *prima facie* case in favor of the motion, and shifted the burden of disproving its averments to the State. As was decided by the Supreme Court of the State, in this case, such is not the practice in this State. "The affidavit was not evidence to support the motion."

There is no statute, and no rule of court in this State, requiring this class of motions to be sworn to, or supported by the affidavit of the party; but on the other hand, there is no law nor rule of practice that relieves the accused from the burden of proof of the averments of his motion by reason of annexing his affidavit to the same. Such a motion can be heard without a preliminary affidavit, but the accused must prove by proper evidence the truth of his averments.

The indictment was valid on its face. And the proceedings in respect to the impaneling and organization of the grand jury that found the bill of indictment, were also valid and regular on their face, and the matters alleged against the validity of the action of the Board of Supervisors, were *in pais* and were required to be shown by competent and independent evidence. The matter complained of by the plaintiff in error, related to the purpose or motives of the members of the Board of Supervisors in making the selection of the jurors, and in the alleged discrimination against the colored race. If true, this should have been proved by competent testimony on the hearing of the motion.

Assuming however, that a proper and explicit affidavi would have made a *prima facie* case for the accused for quashing the indictment upon the grounds stated in the motion, it is clearly pointed out in the opinion of the Supreme Court of the State in the case, that the affidavit was insufficient and ineffectual to raise the legal presumption of invalidity against the indictment.

It cannot be held, according to the uniform practice of this State, or the practice at common law, that the *ex parte* affidavit of the accused to a motion of this character, can place upon the State the whole burden of proving affirmatively the validity of each and every step taken in the drawing, impaneling and organization of the grand jury, by evidence outside of the record of these proceedings, which appear regular and valid on their face. The Circuit Court could not know judicially that the proceedings of the Board of Supervisors of the county in the matter of selecting the grand jurors were irregular, or that the motives were improper. The Board of Supervisors was a legal body having its sessions entirely distinct and separate from the Circuit courts of the State.

Upon a charge or allegation of this character made in the progress of a trial in the Circuit Court, that the action of the Board, legal on the face of the proceedings and lists of jurors returned by the Board to the Circuit Court, was in fact illegal, the Court could only know the truth of the charge by the introduction of competent and independent evidence, by the person making the charge.

The Supreme Court of the State has not denied to the accused any right secured to him by the Federal Constitution or the amendments thereto, but the decision is, that the accused failed to show, or to prove, that any of the constitutional rights secured to him by the Federal Constitution have been denied to him by the Circuit Court of the State. The case therefore stands upon the assumption of fact, that the accused has not been deprived of any of his constitutional rights.

This decision of the Honorable Court in Neal vs. Delaware, *supra*, in which the affidavit of the defendant to the mo-

tition for removal, was considered as evidence on the motion to quash the indictment, proceeded on the assumption of an agreement of counsel that the affidavit might be so considered. That decision would be in point, if there had been such an agreement of counsel in the case now before the Court. There was no such agreement in this case, and according to the general practice in the State, a motion, whether sworn to or not, is not evidence of the truth of its affirmative averments, which are not shown by the record of the Court or judicially known to the court, but on the contrary such matters *dehors* the record must be shown by independent evidence on the hearing of the motion.

THE MOTION TO QUASH THE JURY' PANEL.

The objections to the panel of jurors drawn for the term, and from which the jury was taken that tried the plaintiff in error, is that the jurors were irregularly drawn, and not in compliance with the State laws. And for this reason it is averred in the motion that a trial by such a jury would deprive the accused of his constitutional right to be tried by *due Course of law*.

The action of the Circuit Court in denying this motion was one of the errors assigned on the appeal to the Supreme Court of the State, and the Supreme Court of the State expressly held that none of the assignments presented any ground for a reversal of the judgment. This is an adjudication by the State Court that the panel of jurors was properly and legally drawn, according to the laws of the State.

Section 2365 of the Code of 1892, authorizes the jurors to be drawn from the jury box at each regular term, or at a special term of court. And section 2367 of the Code of 1892, authorizes the jurors to be drawn in vacation by the Judge of the Circuit Court, or by his direction, by the Circuit and Chancery Clerks, and the Sheriff of the county, and the lists of the jurors so drawn are to be certified by these officials. The drawing of the

jurors in this case was in conformity with these sections of the Code of the State.

This however, is purely a State, and not a Federal question, and whether the decision of the State Court in this respect is correct or erroneous, is wholly immaterial so far as the consideration of the case by this Honorable Court is concerned.

Even had the drawing of this jury been irregular and not in conformity with the State statute, the right of the accused to a trial by due course of law would not have been denied him, if the law of the State as interpreted by the Supreme Court of the State, was that such an irregularity did not present a prejudicial error for which there should be a reversal of the case. Various minor irregularities may occur in the trial of a criminal case, which are not in conformity either to the common law nor to the statutes or rules of practice of the State, which may not, according to the general laws of the State, constitute grounds for setting aside a verdict, or for the reversal of the judgment of the trial court on an appeal to the Supreme Court of the State. It is not contended or suggested, that the petit jury was not composed entirely of fair and impartial jurors, and the objection relates merely to the technical form or mode of procedure in the drawing of the jurors.

The entry on the minutes of the Circuit Court shows the list of jurors constituting the panel, the time and the manner in which they were drawn, and the proper certificate of the Circuit and Chancery Clerks and the Sheriff of the county, in exact conformity with the Statutes of the State. This was argued on the appeal to the Supreme Court of the State, and decided by that Court on the appeal.

A review of the decision of this point does not come within the jurisdiction of this Honorable Court as it is not a Federal question but one purely and exclusively for the decision of the State Court.

THE MOTION TO POSTPONE THE TRIAL.

The action of the Circuit Court of the State in refusing a continuance or postponement of the trial is one of the grounds assigned for error in this Court.

This presents simply a question of practice or procedure in criminal cases, and is not a Federal question and cannot be considered upon this writ of error.

But aside from this, no injustice was done the accused by this action of the Circuit Court. The accused was negligent in directing process for his witnesses, as is explained in the statement of the case. It was shown on the hearing of the motion that the presence of two of the three absent witnesses could not possibly have been procured, and the materiality of the testimony of the third witness was not shown.

These matters were all fully argued by counsel, and carefully considered by the Supreme Court of the State on the appeal.

It is the well settled law of the State according to the decisions of the Supreme Court, and according to the common law practice and procedure, that the granting or refusal of continuances rests so largely in the discretion of the trial Judge, that his action in this respect will never be reversed on appeal, except in a case where this discretionary power has clearly and manifestly been abused to the prejudice of the defendant.

OBJECTIONS TO JURORS.

The action of the Circuit of the State in deciding upon the qualifications of individual jurors, is also assigned for error in this Court.

By section 264 of the State Constution of 1890 it is provided that:

"No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of such

qualification in any juror shall not vitiate any indictment or verdict. The Legislature shall provide by law for procuring a list of persons so qualified, and the drawing therfrom of grand and petit jurors for each term of the Circuit Court."

The jurors were all clearly shown to be fully qualified. The precise objection was that the Board of Supervisors had ordered a new registration in April 1894, of the voters of the county, and the order did not show or recite the statutory necessity for the registration. This was not required.

Sections 3619 and 3620, of the State Code of 1892, conferred upon the Boards of Supervisors full discretionary power to order a new registration of voters, whenever the registration books are lost or destroyed, or when they get into confusion, as they may by the death or removal of voters, or the improper registration of voters.

But the disqualification of a juror, because he is not registered as an elector or cannot read and write, if qualified in other respects, does not invalidate his verdict, under the constitutional provision in this respect, which is equal and uniform in its operation between the white and colored races, and is valid under the Constitution of the United States, and the amendments thereto. This involves a State and not a Federal question and cannot be considered on this writ of error.

The objection, made also in the assignment of errors, that the Circuit Court of the State, could not on the 5th day of December 1894, and at the same Term, correct its minutes of the 3rd of December 1894, so as to show a full and *verbatim* entry of the list of jurors and the certificates of the Chancery and Circuit clerks and the Sheriff, showing the drawing of the panel, is wholy without merit. The entry as made conformed to the facts as they acctually appeared in connection with the drawing of the jurrors, and it was clearly within the power of the Circuit Court, and it was proper that the entry should have been made in accordance with the facts.

This question was also presented to, and considered by the Supreme Court of the State on the appeal from the judgment of the Circuit Court.

The question of the power of a court of record to amend its minutes so as to show the proceedings and orders of the court as actualy had and made, is not a Federal question but solely and exclusively a question of practice common to all courts of record whether State or Federal.

It is respectfully submitted that the case should be dismissed, or the judgment of the Supreme Court of the State should be affirmed.

FRANK JOHNSTON,

ATTORNEY-GENERAL OF MISSISSIPPI.